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EXPLORING THE CONSTITUTIONAL LIMITS TO WORKFARE AND LEARNFARE

MARK ANTHONY DRUMBL*

RÉSUMÉ

Depuis quelques temps, on s'intéresse de plus en plus aux concepts de programmes de travail et de programmes de formation obligatoires à l'intention des bénéficiaires d'aide sociale. Dans cet article, l'auteur examine les arguments en matière de politiques sociales qui sont en faveur ou qui s'opposent à ces types de programmes. Il les étudie également selon la perspective de la *Charte des droits*. Il conclut que les programmes de travail et de formation obligatoires peuvent faire l'objet de contestation en vertu de la *Charte des droits* à moins qu'on y adhère librement ou qu'ils soient soigneusement élaborés.

Without work all life goes rotten. But
when work is soulless, life stifles and dies.

— Albert Camus

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A. INTRODUCTION

Social assistance reform is rapidly becoming a central element in the agora of Canadian politics. Academics, politicians, and the general public are demonstrating a growing desire to overhaul Canada's welfare programs.¹ These initiatives emanate partly from economic concerns: as the end of the current recession still seems far from near, many feel that the number of "government dependants"² needs to be reduced.³ Yet, for the large part, these economic concerns mask a more fundamental attitudinal shift on the part of the "haves" towards the "have-nots". Political discourse is orienting itself away from the notion that a person in need has a "right" to receive welfare⁴ to one in which recipients

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1. G. York, "Grits vow radical social reform", *The Globe and Mail* (1 February 1994) A1. Federal Indian Affairs Minister Ron Irwin is actively considering implementing workfare programs on First Nations reserves, stripping recipients of their benefits should they refuse to do community work: Canadian Press, QL National General News, May 8, 1994. Provincial governments, responsible for social assistance, have also been vocal in this area. In Ontario, the Social Assistance Review Committee proposed that receipt of welfare should be closely tied to work, job search and schooling requirements: *Report of the Social Assistance Review Committee: Transitions* (Toronto: Queen's Printer, 1988) [hereinafter the *Transitions Report* or simply *Transitions*]; a position taken by the current government in *Turning Point: White Paper on Welfare Reform* (Toronto: Queen's Printer, 1993) [hereinafter *Turning Point*]. The Ontario Progressive Conservative Party in its 1994 policy paper *The Common Sense Revolution* expressly promises mandatory community service, workfare and learnfare for welfare recipients. New Brunswick has also recently proposed a vigorous workfare-style scheme in *Creating New Options* (Fredericton: Department of Income Assistance, December 1993): see section B(2)(b)(ii) of this article. The Finance Ministers of Alberta and Saskatchewan have also indicated a willingness to seriously consider workfare: Canadian Press, QL National General News, December 1, 1993. Nova Scotia Social Services Minister Jim Smith recently announced that his government will force people on welfare to get retraining in order to continue to receive benefits: Canadian Press, QL National General News, March 25, 1994.
 2. Although this article focuses on welfare recipients, the ideology of workfare could apply to all sources of assistance from the state, including unemployment insurance benefits. Many of the constitutional arguments raised by this article apply to more persons than simply welfare recipients.
 3. C. McInnes, "Ontario welfare reform to undergo major cutback", *The Globe and Mail* (4 March 1994) A4. The dramatic increase in the number of persons on welfare has placed upward pressure on the costs of these programs. P. Rochman, in "Working for Welfare: A Response to the Social Assistance Review Committee" (1989), 5 J.L. & Social Pol. 198 at 201 notes that between 1969 and 1987 the number of persons on social assistance increased in Ontario by 175%. Of more immediate concern is the fact that, at present, 1.3 million Ontario residents (including 1 in every 5 children in the province) rely on social assistance for the basics of survival; this figure has doubled since 1990: Canadian Press, QL Government News, March 21, 1994. The costs and caseloads of the Ontario social assistance system have more than doubled in the last three years, principally due to the recession: Canadian Press, QL Québec-Ontario Regional News, February 4, 1994. These figures are indicative of trends across Canada.
 4. This position is summed up by Ian Johnstone, "Section 7 of the *Charter* and Constitu-

are to be bound by a “reciprocal obligation” to “pay back” the state for whatever benefits they acquire.⁵ The “pay back” requirement often entails that welfare benefits are to be “earned” through “responsible behaviour”. These attitudinal shifts correspond with an “individualized” view of the origins of poverty: instead of perceiving poverty as emanating from structural factors, it is believed to flow from the misconduct and irresponsibility of the recipient.⁶

Within the ranks of those promulgating the “reciprocal obligation” approach are the voices of those proposing the implementation of “workfare” schemes.⁷ This chorus increasingly includes both economists⁸ as well as the state officials responsible for administering the allocation of social assistance.⁹ Workfare, in a nutshell, means that social assistance recipients must engage in certain activities mandated by the state—for example planting trees, proving they are looking for employment, completing community service—in order to continue

tionally Protected Welfare” (1988), 46 U.T. Fac. L. Rev. 1 at 9: “Welfare entitlements are conceived as rights, not favours—a fulfilment of the ideal that each person [is] entitled to his/her due as citizen and individual deserving of dignity. In liberal egalitarian theory, welfare is among those rights that are essential to the enjoyment of all other rights”.

5. *Turning Point*, *supra*, note 1; *Transitions*, *supra*, note 1; *Creating New Options*, *supra*, note 1; J. Weinberg, “The Dilemma of Welfare Reform: “Workfare” Programs and Poor Women”, (1991) 26 New England Law Rev. 415 at 421; Rochman, *supra*, note 3 at 201 cites a Gallup Poll which found that 84% of Canadians believe that welfare recipients should be made to work as a condition of welfare: *Toronto Star* (1 December 1988) A3.
6. T. Corbett et al., “Learnfare: The Wisconsin Experience” (1989), 12 Focus 1 [hereinafter Corbett.], cited in J. Mosher, “Law’s Response to Poverty” (U. of T., 1994) at 442 [hereinafter Mosher].
7. L. Mead, *Welfare: Reform or Replacement?*, Subcommittee on Social Security and Family Policy of the Committee on Finance, U.S. Senate, February 23, 1987 (Washington: U.S. Government Printing House).
8. Judith Maxwell, former chairperson of the Economic Council of Canada, has called for the implementation of mandatory community-service through a Job Corps and training programs in which all unemployed Canadians under the age of 25 would participate: G. York, “Social Programs Called Outdated”, *Globe and Mail* (17 November 1994) A1.
9. On January 31, 1994, Federal Human Resources Minister Lloyd Axworthy announced that Canada’s social security network is in need of significant reforms. According to York, *supra*, note 1 at A1: “The key to the government’s reforms is the idea of ‘rewarding effort’ by the unemployed. *Those who refuse to enrol in job training, apprenticeship, literacy, community service or other government programs could suffer a financial penalty* [emphasis mine].” Although social assistance falls under the legislative authority of the provinces, federal policies in this area are important, especially as they mould federal approaches to cost-sharing, upon which many provincial initiatives are dependent.

to receive benefits.¹⁰ There is no shortage of scholarly literature discussing the economics of workfare. Nor is there any lack of academic debate regarding the policy merit of such programs. However, one area that has received little academic or judicial attention¹¹ involves the constitutional limits to the implementation of workfare schemes¹²; and this despite the fact that from a policy planning perspective, it is clearly unwise to enact any program scheme that risks violating the rights guarantees contained in the *Canadian Charter of Rights and Freedoms*.¹³

This article shall first consider whether absolute workfare—for instance whether a welfare recipient can be obliged to pave a road at the state's behest—can survive *Charter* scrutiny. It is submitted that the likelihood of such unfettered schemes satisfying the substantive rights guarantees provided by the *Charter* is low. With this analysis as a starting point, this article shall then explore whether less coercive “reciprocal obligation” programs—such as conditioning benefits upon a mandatory job search—would hold constitutional muster and, if so, to what extent.

The “entitlement” to social assistance is being unilaterally removed from our social contract. Today, as throughout history, the rules governing the relationship between the “haves” and “have-nots” are not being written at a level of equal bargaining power: on one side there is the state, with all its resources, and on the other, a scattered group of individuals dependent on the state for economic survival. The *Charter* can help equalize the playing field by reducing the ability of the state to manage the lives of welfare recipients. Although in the past the

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10. A narrow definition of workfare would limit workfare to programs providing benefits to recipients in exchange for mandatory work participation. The broader definition of “workfare” used in this article has also been propounded by scholars. For example, S. Smart, “A STEP toward Workfare: The Supports to Employment Program and Sole Support Mothers” (1990), 6 J.L. & Soc. Pol’y 226 at 252 uses the term “workfare” to denote “...a program where entitlement to benefits is conditional upon participation in activities intended to lead to employment or increase employability.”
 11. Both in Canada and the U.S. The only Canadian case in which a workfare scheme was challenged on constitutional grounds is *Gosselin v. Québec (Procureur général)*, [1992] R.J.Q. 1647 (C.S.), discussed below.
 12. Johnstone, *supra*, note 4 at 47 writes that: “If workfare is instituted in Canada, as it may well be in certain provinces, it is submitted that subjecting it to scrutiny under...the *Charter* is an appropriate and essential role for the judiciary. The implications for dignity and self-respect make it manifestly clear that the creation, design, and administration of such programs cannot be left exclusively to the political process, and that judicial scrutiny should be a constitutional imperative.”
 13. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

Charter has not occupied a purposive role in promoting the well-being of the class of persons receiving social assistance, this does not necessarily mean that it can never play such a part.¹⁴

B. THE IDEOLOGY AND PRAXIS OF WORKFARE

(1) *Ideological Underpinnings*

Workfare programs are far from homogeneous. As shall become apparent in the following discussion, the term “workfare” covers a plethora of social assistance programs. Nevertheless, these programs differ more in degree than in kind and consequently can all be placed on the same ideological continuum. This continuum is predicated on the belief that assistance is not to be automatically given to a “person in need” for as long as that person remains in need. Instead, a person in need can be disentitled from receiving benefits merely due to the fact that she fails to participate in certain state-run obligations. Not meeting these requirements causes a person to slip from the “deserving poor” to the ranks of the “undeserving poor”.¹⁵ It is the obligatory requirement to continue to do *something* after having qualified as a “person in need” in order to remain eligible for benefits that distinguishes workfare from other forms of social assistance such as child allowances and tax credits which do not involve such behaviour monitoring. For many advocates of workfare, the exact nature of the required activity is of minor importance:

My interpretation is that obligation is what makes the programs tick. It is essential that *some activity be required* of recipients. It is much less critical what that activity is. *Job search, training and education as well as immediate work in government can promote employment—provided they are mandatory* [emphasis mine].¹⁶

Proponents of workfare contend that it is not only the needs of the recipients that must be addressed, but also the interests of the taxpayers funding social assistance programs. Lawrence Mead argues that:

The public is humanitarian but not permissive. It doesn't want to simply give things to people. It wants to give things to them but also to uphold social standards. This is why workfare is potentially attractive, because it speaks to both

14. See also: M. Jackman, “Poor Rights: Using the *Charter* to support social welfare claims” (1993), 19 *Queen's L.J.* 65.

15. For a discussion of the dividing-line between the “deserving” and “undeserving” poor, see L. Muszynski, “Work and Welfare: A Guide to Income Security Reform in Canada” (Draft Paper prepared for the National Council on Welfare, 1988) at 41.

16. Mead, *supra*, note 7 at 165, cited in Rochman, *supra*, note 3 at 212.

sides of the public mind. *It helps people but at the same time requires that they function in ways other people expect* [emphasis mine].¹⁷

Both workfare and learnfare presuppose that welfare recipients need guidance in order to become “productive” members of society. In this sense, the requirements to participate in certain programs are animated by a moral paternalism that assumes that the poor need to be “trained” or “put to work” in order to develop the level of conscientiousness common to the “haves”.¹⁸ According to Lawrence Mead:

The welfare poor have simply not been expected to work...The main reason the long-term poor (women, Blacks, teenagers) do not work steadily is problems of work discipline *peculiar to them*, not the limitations of the labour market [emphasis mine].¹⁹

In the end, however, such programs inhibit the recipient’s transition towards autonomy. They accomplish one of what Isaiah Berlin believes are to be among the most offensive effects of paternalism: the denial of one’s status as a responsible agent.²⁰ Moreover, due to the fact that structurally disadvantaged groups such as women and racial minorities comprise a disproportionately large number of social assistance recipients, the limitations on individual autonomy can exacerbate pre-existing historical inequalities.

(2) *A Contemporary History of Workfare*

(a) **The American Experience**

In the 1960’s the welfare state that emerged out of Roosevelt’s New Deal began to actively incorporate workfare programs. The first of these was simply entitled Work Incentives (WIN).²¹ Although WIN was federally enacted, its actual enforcement

17. L. Mead, *Workfare versus Welfare*, Subcommittee on Trade, Productivity and Economic Growth of the Joint Economic Committee, Congress of the United States, 97th Congress, 2nd Session, April 23, 1986 (Washington: U.S. Government Printing Office, 1986) at 38.

18. This view has also been labelled “behaviouralist” for it presupposes that state involvement in the management of the lives of those on welfare can foster civic responsibility and thereby eviscerate the “culture of defeatism” alleged to cause poverty: M. Weiss, “Reducing Poverty: Alternative Approaches”, *Currents* (December 1992) 14. Within the ambit of the behaviouralist theories, little allowance is made for the systemic and structural roots of poverty, nor is attention paid to the claim that poverty and unemployment is a necessary by-product of capitalism.

19. Mead, *supra*, note 17.

20. I. Berlin, “Two Concepts of Liberty”, in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) at 157.

21. 42 U.S.C. paras. 630-45.

was organized at the state level. Classes of recipients designated by the state were mandated to register for work and, if offered a job, were obliged to accept it (and thus lose welfare benefits in so far as the new work removed the recipient from the ranks of those “in need”) or forfeit their benefits. The states that introduced a paid work requirement usually limited this to a 13 week period.²²

The effect of the WIN programs was not significant. According to Paula Rochman, these programs were always poorly funded and failed in their effort to place recipients into meaningful jobs.²³ In fact, in 1972, only 15% of WIN participants were able to retain jobs more than 3 months after completing the program.²⁴ Joanna Weinberg notes that many of these persons would likely have found similar employment on their own, without participating in workfare.²⁵ In his survey of WIN workfare programs, Richard Polangin found that:

Typical jobs are the washing of public vehicles, landscape maintenance or custodial work. Workfare jobs almost never include training in marketable skills (e.g. computer data entry or health care).²⁶

Amendments made to WIN during the Carter and Reagan administrations did not render the program more effective; they instead increased the number of part-time and temporary jobs given to participants. In 1977, Congress enacted workfare programs under the ambit of the *Food Stamp Act*, with a view to mandating at least one member from each food stamp household to “work off” the household’s allotment in a public service job.²⁷ More aggressive programs were enacted in 1988 with the adoption of the Family Support Act.²⁸ This legislation mandates that states add to their public assistance programs a provision that certain classes of AFDC²⁹ (Aid for Families with

22. Rochman, *supra*, note 3 at 209.

23. Ibid. at 207.

24. Ibid. at 208.

25. Weinberg, *supra*, note 5 at 429, notes that half of all AFDC recipients “...move off the rolls, usually to a job, within two years regardless of participation in any program.”

26. R. Polangin, “Conscripted Labor: Workfare and the Poor” (1982/3), 16 *Clearinghouse Review* 544.

27. “New Research Report on Workfare” (1982/3), 16 *Clearinghouse Review* 332.

28. 42 U.S.C. paras. 301-1397c (1988).

29. AFDC is a rough parallel to welfare in Canada. AFDC recipients are predominantly single mothers. Persons exempted from the *Family Support Act* workfare programs include: individuals who are ill, incapacitated, or over 65; persons needed in the home because of the illness or incapacity of another family member; a caretaker parent of children under 6; a person employed 30 hours or more; women in the last trimester of pregnancy; non-principal-earner parents in a two-parent family; and parents of chil-

Dependent Children) recipients are to participate in an obligatory employment, education and training program—entitled JOBS—in order to continue to receive assistance.³⁰ Participation targets are set: 7% of the eligible AFDC population in 1991, rising to 20% in 1996. Failure on the part of a state to meet these shall result in the reduction of federal funding. Given this constraint, many American states have complied with the Family Support Act by introducing workfare programs more extensive than under WIN.³¹

There is one state program of particular interest: Greater Avenues for Independence (GAIN), introduced in California in 1985.³² It is fairly comprehensive in nature, featuring job search assistance, on the job training, career assessment, adult basic education (literacy training), English as a second language classes, as well as vocational education. It allocates funds for child-care and transportation support services so as to permit many single mothers to participate.³³ Nevertheless, despite the comprehensiveness of the program, only 4% of participants find jobs that enable them to leave AFDC once the program ends;³⁴ the income level of this small group rises from 8 to 37 % due to their new employment.³⁵ GAIN's inability to move recipients off AFDC can be linked to the fact that it requires participants to accept any job within their "employment goal", regardless of the salary, even if the end result is a net loss of income due to the recipients' having to pay the child care, transportation and medical expenses that the state would have defrayed while the recipient was in the program.³⁶

dren under 3 in AFDC-U families.

30. JOBS consolidates several pre-existing programs—WIN, the WIN demonstration project, Community Work Experience, as well as several work supplementation and job search programs—into one administrative umbrella. According to para 681(a) of the *Family Support Act*, the purpose of the JOBS is "to assure that needy families with children obtain the education, training and employment that will help them avoid long term welfare dependence".
31. Rochman, *supra*, note 3 at 209.
32. *Greater Avenues of Independence Act of 1985*, Cal. Welf. & Inst. Code. para 111320 (West 1991).
33. The provision of such funds is of paramount importance, especially (as shall be discussed in section C(2) of this article) if a workfare program is to avoid perpetuating discrimination against women in the labour market. Rochman, *supra*, note 3 at 210, notes the failure of a mandatory Pennsylvania workfare scheme to attract women participants (only 24% were women) due, in part, to the refusal of budget-makers to allot any funds for child-care.
34. Weinberg, *supra*, note 5 at 444.
35. Rochman, *supra*, note 3 at 209.
36. According to Weinberg, *supra*, note 5 at 449, the average rate of pay in such employ-

Learnfare programs have also been adopted in several States. The best known example is a fairly coercive scheme enacted in Wisconsin in 1988.³⁷ Under this program, family will lose its AFDC grant for the entire amount designated for any teen-age children (13 through 19 years of age) included in the grant if these children either drop out of or fail to attend school on a regular basis.³⁸ Once a student has ten unexcused³⁹ absences within a 6 month period or has dropped out of school, that student becomes "monitored". Once "monitored", a student cannot have more than two unexplained, full-day absences per month without engendering a sanction against the student's family.

Although intended to combat truancy among secondary school students, Wisconsin's learnfare has a highly punitive effect on all members of AFDC dependent families. Critics note that sanction-induced class attendance will not help children from disadvantaged backgrounds break the cycle of poverty.⁴⁰ On another note, learnfare clearly places a burden on poor parents that is not felt by the middle-class, for there are no state sanctions on non-welfare dependent families should their teen-age children fail to attend school.

ment hovers around the minimum wage (in California \$4.50 per hour at the time of writing). After work-related expenses are deducted, the total salary is less than the AFDC allotment for many families. Weinberg also links these lower salaries to job market trends: she notes at 450 that "...many of the new jobs created during the 1980's paid substantially lower wages than the jobs lost, with minimum-wage service sector jobs replacing higher paying factory and industrial work.

37. 1987 Wis. Laws 27; Wis. Admin. Code para [HHS] 201.195(1), (4)(a), (4)(b), (8) (March 1990).
38. In 1989, for a family consisting of a mother and two children, this sanction results in a reduction of \$77.60 a month from a total grant of \$517.60. There is also an indication that the requirement shall be extended to children aged 6 to 12: Corbett et al., in Mosher, *supra*, note 6 at 442.
39. Excused absences include: (1) the student has been expelled from school and alternative schooling is not available; (2) the teen-age student has a child under 3 months of age; (3) no licensed day-care is available for the children of teen parents subject to learnfare; (4) there are prohibitive transportation problems; (5) the teen is over 16 years of age and is not expected to graduate from high school by age 20.
40. Corbett et al., in Mosher, *supra*, note 6 at 446. The program is faulted for its lack of outreach and family intervention, the absence of in-depth fact-finding before the initiation of the sanction process, the lack of positive inducements, and the failure to ensure the provision of a broad array of support services for learnfare students.

(b) Workfare in Canada

(i) Unfettered Workfare

Absolute "work for welfare" schemes are fairly uncommon in Canada.⁴¹ The most relevant example⁴² of such a scheme is a policy enacted by the Saskatchewan government in 1984.⁴³ This program cut a recipient's monthly benefits from \$581.00 to \$384.00 if s/he did not accept employment or job training offered through the provincial program. The only exception, as in the WIN system, was if the recipient could demonstrate that s/he was not employable. Rochman notes that this system resulted in the creation of few permanent jobs, but recipients forced to partake in the program built a golf course, cleared ditches and constructed a health spa at a time when over 50% of park maintenance workers were laid off due to a supposed lack of work.⁴⁴

Québec has also implemented workfare-style legislation. In Québec, social assistance allowances are reduced for single employable persons between the ages of 18 to 30 to one-third of the amount paid to single persons over the age of 30, unless such persons participate in a workfare program.⁴⁵ This legislation has been the subject of the only constitutional challenge to workfare legislation in Canada. In 1992, a claim that this provision violates sections 7 and 15 of the

41. This is in large part due to the fact that the terms of the *Canada Assistance Plan* (CAP) exclude such programs from cost-sharing: see P. Evans "From Workfare to the Social Contract: Implications for Canada of Recent U.S. Welfare Reforms" (1993), 19 *Can. Public Policy* 55 at 62. However, the federal government appears to be responding to the economic and political forces of decentralization by expanding rather than contracting the degree of discretion accorded to the provinces. Moreover, as the federal government limits spending increases under CAP, the provinces may become more inclined to initiate their own social assistance programs independent of CAP and any policy guidelines contained therein. Federal transfers to Ontario shrank from 50% of social assistance costs in 1989-90 to 28% in 1992-93: *Turning Point*, *supra*, note 1 at 8.

42. In 1982 Manitoba introduced a plan whereby welfare recipients were compelled to clear brush and received \$4.00 per hour. The program was short-lived as the province soon determined that brush-cutting was not an important financial priority. In 1982 Alberta also initiated a program whereby welfare recipients were mandated to work up to 40 hours per week in the homes of disabled elderly persons. Rochman, *supra*, note 3 at 215 notes that this program never got underway because people were reluctant to hire the recipients. This illustrates an important point: many members of the public are in favour of workfare schemes until it is they who are called upon to hire the recipients. The recipients are thus placed in an untenable situation since they must work in order to receive welfare yet there are few people who will hire them.

43. In 1987 Saskatchewan proposed re-enacting this scheme. At that time, a group called Equal Justice for All denounced it and equated it with slave labour: " 'Slave Labour' Welfare Plan Denounced", *The Globe and Mail* (20 April 1987) A4.

44. Rochman, *supra*, note 3 at 215.

45. *Loi sur la sécurité du revenu*, L.R.Q. c. S-3.1.1.

Charter was rejected by Reeves J. of the Québec Superior Court.⁴⁶ Nevertheless, the legislation received widespread public condemnation and was described by one academic as a tool of social control.⁴⁷

(c) More Subtle Yet Equally Coercive Workfare Requirements

Entitlement to social assistance in Canada is generally dependent on the satisfaction of conditional requirements. For example, all Canadian provinces have, to varying degrees, incorporated "job search" and "mandatory training" requirements into their social assistance legislation. Although seemingly more subtle than the "workfare" requirements discussed earlier, much of this difference may be more apparent than real.⁴⁸

In this section, this article shall summarize the "behaviour management" requirements woven into Ontario's social assistance legislation. These requirements are similar to those found in the welfare systems of the other provinces. The present tone of the political climate has prompted certain provinces to reassess the use that can be made of such subtle workfare obligations. In order to illustrate the nature of this reassessment, the proposed introduction of "opportunity planning" in New Brunswick⁴⁹ shall also be reviewed.

(i) *Present Obligations: Ontario as a Case-Study*

Subtle behaviour manipulation, modification and monitoring requirements dot the two statutes governing the allocation of social assistance in Ontario: the *Family Benefits Act* (FBA) and *General Welfare Assistance Act* (GWAA).⁵⁰ The most important obligations placed on employable GWA recipients are the

46. *Gosselin, supra*, note 11. This decision shall be discussed in greater depth in section C of this article.

47. L. Lamarche, "La nouvelle Loi sur la sécurité du revenu au Québec: quelques réflexions d'actualité" (1991), 21 *Revue de droit de l'Université de Sherbrooke* 335.

48. In his recent proposals to introduce measures designed to "reward effort" into Canada's social assistance network, Human Resources Minister Lloyd Axworthy "...acknowledged there may only be a subtle kind of difference between this kind of encouragement [the "rewarding effort" provisions] and outright coercion...but...denied that the government is considering a U.S.-style "workfare" scheme under which people are stripped of their benefits if they refuse to work": York, *supra*, note 1 at A1.

49. New Brunswick is not alone when it comes to actively rethinking the role social management can play within the welfare context. Alberta, for example, announced in November 1990 its Supports for Independence Program which requires "self-improvement" plans in exchange for counselling, training and slightly higher benefits: Evans, *supra*, note 41 at 63.

50. R.S.O. 1990, c. F.2 and R.S.O. 1990, c. G.6, as amended. Under the GWAA municipalities provide basic income support to Ontario residents who are in short-term need; under the FBA the provincial government provides assistance for certain designated groups who are deemed to be in long-term need.

mandatory job search requirements.⁵¹ In order to remain eligible for benefits the recipient must "make reasonable efforts to obtain employment". In actual practice, this can produce a tiresome as well as a fruitless result: a repeated mechanical job search in areas where there are no job opportunities, in fields in which the recipient has no desire to work or for jobs incompatible with the recipient's skills and which may decrease the likelihood of long term employment, a "mandatory mission of futility".⁵² Yet if the claimant does not go through the motions, benefits will be cut. In many cases the job search requirements can be so onerous that they take the form of workfare in their own right.

There are also learnfare requirements in Ontario. Section 1 of the FBA defines a dependent child as a person supported by a parent (or someone *in loco parentis*) who, if sixteen years of age or over, attends⁵³ an educational institution and is *making satisfactory progress with his or her studies*. The parent is thus penalized for the child's failure to make satisfactory progress in school, a requirement more onerous than that found in Wisconsin's learnfare scheme. The entire family thus suffers financially since a child, regardless of academic performance, must still be fed and clothed, and the money related to these needs must then flow from the reduced benefits to which the parent is entitled.

(ii) *Future Directions: The New Brunswick Example*

Until 1960, the *New Brunswick Support of the Poor Act*⁵⁴ provided that:

Any two overseers for a parish with the consent of a magistrate, shall oblige any idle, disorderly person, rogue or vagabond who is likely to become chargeable on the parish where he resides, to labour for any person willing to employ him.

Although this provision has disappeared, New Brunswick's flirtation with workfare has not. In 1993, the province released *Creating New Options*⁵⁵ which proposed the enactment of the N.B. Works Project, of N.B. OPPORTUNITIES, and of the N.B. JOBS CORPS. Of all provincial initiatives in the area of social

51. Reg. 537, R.R.O. 1990, s.4.

52. Advisory Group on New Social Assistance Legislation, *Time for Action* (Toronto: Queen's Printer, 1992), cited in Mosher, *supra*, note 6 at 490.

53. In *Re Howell and Director of Family Benefits Branch of Ministry and Community Services* (1986), 56 O.R. (2d) 773 at 777, Griffiths J. held that "...being enrolled in school was not synonymous with being in attendance." Thus, there is a requirement similar to that found in Wisconsin, namely that the child "go regularly to" school, else the amount of welfare benefits accruing to the family shall be reduced.

54. R.S.N.B. 1952, c. 221, s. 3(1).

55. *Creating New Options*, *supra*, note 1.

assistance reform, the language and structure of these projects is the closest to American-style workfare schemes.

Predicated on the assumption that social assistance programs must be “active” rather than “passive”, *Creating New Options* makes it clear that recipients must look for work, accept work when available, and participate in education and training programs to prepare for work opportunities. In order to place pressure on those slated to participate but fail to do so or are unsuccessful in integrating into the job market, the province proposes creating two streams of income assistance: Temporary Income Replacement to persons with the potential to re-enter the workforce or participate in “personal development efforts such as volunteer work, training or employment” and Permanent Income Replacement provided to those with significant employment barriers.⁵⁶ The amount of benefits awarded under the Temporary Income Replacement will take into account the willingness to participate in work and training opportunities.⁵⁷ For those persons participating in “active programming opportunities” provision is made for the allotment of a “participation allowance” the covering additional transportation, clothing and other incidental expenses faced by working people. N.B. Works strongly favours conditioning welfare benefits on participation in the “active programming” schemes:

The Canada Assistance Plan...does not allow for conditions to be placed on the allocation of financial assistance related to basic needs. This condition may not be compatible with wanting to move away from a welfare system to a more positive income replacement vehicle driven by new responsibilities on the part of the government and the client....In today's economy, individuals must avail themselves of all opportunities to be fully prepared for today's competitive job market.⁵⁸

N.B. Works also adumbrates the use of indirect as well as direct coercion:

There is a segment of employable clients who are not...highly motivated. For a variety of reasons, these individuals are reluctant to leave the security of income support and refuse opportunities for training and employment when presented. In [these] situations, the system could be more persuasive. For these individuals, the temporary nature of income support needs to be reinforced.⁵⁹

56. *Ibid.* at 20.

57. *Ibid.* at 19.

58. *Ibid.* at 18.

59. *Ibid.* at 18-19.

(3) Summary

A survey of the various workfare programs in place in North America reveals that some have been more successful than others, yet very few have reported any success at all. One reality that must be addressed is the fact that in many cases there are simply no jobs for welfare recipients after they have completed their work or training requirements. In this sense, workfare serves no useful purpose for the recipient, but just creates pools of conscripted labour. In this sense, workfare programs do not satisfy the reciprocal obligation so emphasized by its proponents.

There is evidence that workfare programs might oblige laid-off workers to perform the same jobs they previously held, yet pay them less than what they had previously earned.⁶⁰ Such a scenario is clearly undesirable both from a moral standpoint as well as from a practical one, since the participants shall not learn any new skills. Furthermore, this creates downward pressure on the wages of existing employees and threatens their job security, especially in the non-unionized public sector, since the state can simply lay-off then re-route the same persons into the workfare program. Workfare can also increase unemployment due to threats posed to existing jobs when numbers of non- or low-salaried persons are available for work.

The American experience reveals another major danger of workfare: the creation of two strata of poor persons—those receiving public assistance and those who, once in a workfare job placement, are employed in the private sector.⁶¹ Given the fact that there are costs involved in going out to work, workfare participants may very well be worse off financially than they had been on welfare.⁶² In this regard, workfare could decrease the number of persons on the welfare rolls yet increase membership in the ranks of the working poor, thereby hiding and

60. Rochman, *supra*, note 3 at 211 reports that in New York a group of sanitation workers was laid off, became eligible for welfare, and within two months were performing the same tasks as when they were working, except that they were now on workfare.

61. It is already estimated that, in Ontario, nearly three-fifths of all poor families headed by working-age adults in 1984 were supported by someone working either full-time or part-time: *Transitions*, *supra*, note 1 at 30.

62. Child-care, transportation, clothing and the increased need to "eat out" are some examples of this. Moreover, as noted by Smart, *supra*, note 10 at 235, rents paid for subsidized housing might increase when earned income rises. If the earnings from workfare programs are considered to be earned income, then the participants might face increased rental expenses. The New Brunswick government, in *Creating New Options*, *supra*, note 1 at 25, partly addresses this concern by ensuring that the participant in the work program retain access to the subsidized housing at the prior rent, yet only for a limited period of time.

privatizing poverty. This bifurcation of the welfare poor has prompted Joanna Weinberg to note that:

What is at stake in the structure of a workfare program is not so much the demise of state-subsidized public assistance programs, but the possibility of privatization of the responsibility to assist the indigent, through an unregulated private market. In this way...mandatory work requirements resemble...a radical departure from the central ideology that underlies the public assistance programs of the twentieth century, that of a public responsibility for the poor.⁶³

C. THE CONSTITUTIONALITY OF “WORKING FOR WELFARE”

Compulsory work-for-welfare only constitutes a small part of the workfare-style schemes presently operating in North America.⁶⁴ However, as a Weberian⁶⁵ “ideal-type” of the workfare model, it constitutes a useful point of departure in terms of defining the types of constitutional rights that less coercive forms of workfare might violate.

Constitutional scrutiny in Canada operates through the application of the *Canadian Charter of Rights and Freedoms*. The *Charter* is to be purposively interpreted⁶⁶ so as to protect the individual from the effects of governmental action.⁶⁷ The *Charter* has thus far played a relatively minor role in reshaping the manner in which the Canadian welfare state is structured.⁶⁸ Nevertheless, the rules governing the welfare state—and the manner in which they are administered—can menace human dignity and the security of the person in a manner that exhorts constitutional scrutiny.

(1) Does Section 7 of the *Charter* Encompass a Right to Receive Welfare?

If the receipt of welfare to provide for basic needs is a constitutional right guaranteed by the *Charter*, then the government cannot curtail the allocation of

63. Weinberg, *supra*, note 5 at 419.

64. Evans, *supra*, note 41, cited in Mosher, *supra*, note 6 at 436.

65. M. Weber, *Methodology of the Social Sciences*, E. Shils and H. Finch (eds.) (Glencoe, Ill.: First Press, 1949).

66. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Morgentaler, Smolling and Scott* (1988), 44 D.L.R. (4th) 385 (S.C.C.) at 398.

67. *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

68. M. Jackman, *supra*, note 14. This should be contrasted with the relatively significant role the *Charter* has played in changing the nature of the criminal law and the law of evidence in Canada.

such amounts, just as it cannot remove any other *Charter* right such as the accused's right to silence, except in accordance with principles of fundamental justice. There have been scattered attempts to characterize the receipt of social assistance as a substantive right. These have generally been unsuccessful before the courts. Nevertheless, the issue is far from settled. Martha Jackman argues that the refusal to incorporate "welfare rights" within the ambit of s.7 is neither in accordance with the intentions of the drafters of the *Charter* nor with legitimate policy goals.⁶⁹

A finding that the receipt of welfare is intrinsic to the right to "life, liberty and security of the person" would have serious implications for the "reciprocal obligation" approach to the allocation of social assistance. The state would be *prima facie* precluded from withdrawing benefits (or, as is generally done in workfare programs, reducing them below the minimal subsistence level) simply because a "person in need" fails to behave in the manner prescribed by the state.

The principal reason why courts have been reluctant to place the receipt of social assistance within the ambit of s.7 stems from the view that welfare is an "economic or proprietary privilege". Even if the receipt of welfare were an "economic right", many judges feel that economic rights were simply not intended to merit *Charter* protection.⁷⁰ Others, such as McLachlin J.A. [as she then was], fear the "floodgates effect" of placing economic rights under s.7:

To accept the plaintiff's argument [that a claim for an economic interest which may enhance a person's ability to acquire aids and amenities to improve the person's life, liberty or security of the person, falls under s. 7] would be to make section 7 applicable to virtually all property interests.⁷¹

69. Jackman, *supra*, note 14 at 76. See also: M. Jackman, "The Protection of Welfare Rights under the *Charter*" (1988), 20 *Ottawa L. Rev.* 257. She does not stand alone in this regard. Johnstone, *supra*, note 4 at 25, notes that the framers of the *Charter* were opposed to the entrenchment of traditional property rights. Many of these concerns were not rooted in the fear that such an entrenchment would straightjacket future governments into indefinitely providing social assistance, yet, rather, that it would interfere with the legislative ability to expropriate land, pass zoning by-laws, and redistribute income through taxation.

70. I. Morrison, "Security of the Person and the Person in Need: Section Seven of the *Charter* and the Right to Welfare" (1988), 4 *J.L. & Soc. Pol'y* 1 at 11. This was the position adopted by the Québec Superior Court in *Gosselin*, *supra*, note 13. As pointed out by Jackman, *supra*, note 14 at 78, the *Gosselin* bench did not address the fact that the reduced social assistance levels were so inadequate that they deprived the plaintiff of any reasonable prospects of life compatible with the interests and values enshrined in s. 7.

71. *Whitbread v. Walley* (1988), 51 D.L.R. (4th) 509 at 521-22 (B.C.C.A.)

It is respectfully submitted that this argument is flawed. The receipt of welfare is much more than a simple economic exchange or a claim against the state for a sum of money. When stripped to its essence, welfare constitutes the only mechanism by which the poor can eke out a minimal standard of living; it is the program of last resort for those without sufficient income who have thoroughly exhausted all other means of support. Terminating social assistance benefits directly impacts on non-economic interests such as the life, physical security, self-respect and dignity of the recipient and her family. It also affects the psychological security and privacy of the recipient: both of these elements deemed to be protected by s.7.⁷² Framed in such a perspective, welfare does not involve economic rights, but the right to "life, liberty, and security of the person".⁷³ To this end, although there is an economic transaction: it relates to one's autonomy as a human being as well as one's ability to survive in contemporary society. As noted by Ian Johnstone:

The important difference between private property and welfare is that the latter denotes only that which is necessary to sustain a minimum standard of living, whereas the former refers to all income and wealth. The connection between bodily well-being and economic security suggests that the fact that not all wealth is protected does not preclude the possibility that a basic level of subsistence is.⁷⁴

To this end, the question that should be asked is whether the state would violate s.7 by denying a person in need the financial resources necessary to sustain a minimum standard of living, bearing in mind that the interpretation of *Charter* rights should be "a generous rather than a legalistic one".⁷⁵ *Couched in this language, this question has not yet been dealt with by the Supreme Court, given the pronouncement by the Court in R. v. Irwin Toy* that it does not wish "...to declare that no right with an economic component can fall within 'security of the person'".⁷⁶ In *Irwin Toy*, the Court went on to conclude that:

72. Morgentaler, *supra*, note 66 at 401; *R. v. Mills* (1986), 1 D.L.R. (4th) 161 (S.C.C.). In *Collin v. Lussier*, [1983] 1 F.C. 218 at 239, Décaré J. of the Federal Court Trial Division held that merely increasing a person's anxiety as to his state of health was sufficient to trigger s. 7. It is clear that removing a person from the last remaining income source upon which that person can depend risks jeopardizing her state of health.

73. Morrison, *supra*, note 70 at 28 notes that "...insofar as welfare creates some psychological security about the provision of basic needs...termination of benefits deprives the person in need of this security."

74. Johnstone, *supra*, note 4 at 25 and 26.

75. *Big M Drug Mart Ltd.*, *supra*, note 67 at 344.

76. [1989] 1 S.C.R. 927 at 1004.

We do not, at this moment choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.⁷⁷

Through its ratification of numerous international conventions, Canada has committed itself to the provision of basic social security. For example, Article 25 of the Universal Declaration of Human Rights, to which Canada is a signatory, provides that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.⁷⁸

Canada's international obligations thus amount to a commitment to use all means (to the maximum of available resources) to guarantee the right of social security, to an adequate standard of living, to housing and clothing, and to be free from hunger.⁷⁹ Although international conventions are not legally binding in Canada, the Supreme Court has held that the international commitments to which Canada has voluntarily consented help define the scope of *Charter* rights.⁸⁰ This is particularly the case in the area of promoting universal human rights.⁸¹ It can thus be argued that Canada's international obligations place upon the state the duty to provide the necessities of life to all citizens in need. International obligations, along with the basic tenets of the common law, also inform the content of fundamental justice.⁸² To this end, if it is not fundamentally just for the state to deny the provision of a minimum income as required by the *Charter*, governmental actors shall be hindered in their ability to curtail the allocation of such an income.

77. Ibid.

78. G.A. Res. 217A(III), U.N. Doc. A/810 (1948). An expanded version of Article 25 was incorporated into the 1966 *International Covenant on Economic, Social and Political Rights*, in which the signatories pledged to take steps to attain the full realization of these guarantees.

79. Morrison, *supra*, note 70 at 4.

80. *R. v. Oakes*, [1986] 1 S.C.R. 103 at 120-1, per Dickson C.J.C. In a dissenting judgment in *Reference Re Public Service Employee Relations Act*, [1987] 3 W.W.R. 577, Dickson C.J.C. went so far as to hold that international law may be considered as non-binding authority for the interpretation of the *Charter*.

81. *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-57.

82. *Reference Re s. 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486.

On another note, section 36 of the *Constitution Act, 1982* offers collateral evidence that the government has committed itself to providing a basic level of income security:

Parliament and the legislatures, together with the government of Canada and the provincial governments are committed to:

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities;
- (c) providing essential public service of reasonable quality to all Canadians.

Ian Johnstone notes that the combined effect of s.36 and *Charter* s.7 could be to inject the legislatures with a constitutional responsibility to ensure that basic needs are met.⁸³ Nevertheless, it must be recognized that s.36 has received little in the way of judicial attention;⁸⁴ in fact, s.52 has never been used to declare as null and void any legislation on account of an inconsistency with s.36. To this end, it is fair to state that this provision is but a policy directive, not a concrete legal obligation. Nevertheless, even if Johnstone exaggerates the potential effect of s. 36 on the constitutionalization of welfare rights, it is clear that, at a minimum, this section serves as evidence that the intent of the drafters of the Constitution was not to leave the provision of essential public services (of which social assistance is arguably one element) entirely to the discretion of the legislature.⁸⁵

83. Johnstone, *supra*, note 4 at 13.

84. There has been no litigation on the question whether s. 36 mandates Parliament to provide a minimal level of income assistance to persons in need. Judicial consideration of s. 36 has, however, touched on several collateral issues. In *Winterhaven Stables Limited v. Attorney General of Canada* (1986), 71 A.R. 1 (Q.B.), the Court held that s. 36 recognized nothing more than the federal government's authority to assist the provinces in the provision of essential public services. In *Reference Re Constitutional Questions Act* (1990), 46 B.C.L.R. (2d) 273 at 315, Southin J.A. of the British Columbia Court of Appeal noted that it is of some importance that the opening words to section 36 indicate that the section operates in a manner not to alter the legislative authority of Parliament or of the provincial legislatures. By logical extension, since mandating the provision of a minimal income might be tantamount to an interference with the legislative authority of Parliament, an argument could be made that this falls outside the scope of s. 36.

85. It is interesting to note that the *Canada Assistance Plan* (CAP), R.S.C. 1985, c. C-1, the legislative scheme under which the federal and provincial governments divide the cost-sharing responsibilities with respect to social assistance programs, states in section 6(2)(a) that the province "will provide financial aid or other assistance to or in respect of any person in the province who is a person in need..in an amount or manner that takes into account the basic requirements of that person." An argument could be made that, should a province agree to cost-sharing, its discretion regarding the provision of social assistance could be reduced. Yet it is unclear as to what effect such statutory entitlements would bear upon the constitutionalization of welfare rights.

In sum, the assertion that there is a constitutional obligation on the state to provide the necessities of life to "persons in need" is controversial, especially in light of the recessionary nature of today's economy. However, it is important to bear in mind Wilson J.'s exhortation in her seminal decision in *Re Singh and Minister of Employment and Immigration*:

The guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice, but such an argument, in my view, misses the point of the exercise.⁸⁶

Given the fact that many of the arguments militating in favour of the constitutionalization of welfare rights have not yet been thoroughly canvassed by the judiciary, it is important to flesh them out and not to prematurely close debate on this subject. Should "persons in need" have a constitutional right to welfare, then it shall be rather difficult for the government to abridge that right through the implementation of a workfare scheme, unless that scheme comports with the procedural and substantive elements of fundamental justice. As shall be further discussed in the next section of this article, the principle of human dignity central to fundamental justice is unlikely to vindicate any work-for-welfare scheme, but may validate less coercive reciprocal obligations. To this end, constitutionalizing welfare rights under s. 7 shall likely never mean that persons have an unfettered claim on the state for social assistance.

(2) *Workfare and the Charter*

If there is no constitutional right to receive welfare, then an individual's eligibility for receipt of social assistance can be conditioned upon certain ongoing requirements over and above the simple demonstration that one is a "person in need". Participation in a workfare program could conceivably constitute such a condition. Nevertheless, the government is still bound to establish workfare conditions that comply with the substantive rights guarantees of the *Charter* and to determine non-eligibility for social assistance in accordance with due process considerations.

In this section, this article shall explore the ways in which a mandatory workfare program in which persons are required to work for the state in order to receive the income they would ordinarily have received under social assistance could violate the *Charter*. Due to their potentially coercive nature, learnfare programs shall also be considered in this analysis.

86. (1985), 17 D.L.R. (4th) 422 at 469 (S.C.C.).

(a) Section 2(d)

The *Charter* provides that:

2. Everyone has the following fundamental freedoms:

.....

(d) freedom of association

Section 2(d) has received much judicial attention in so far as it relates to the ability of individuals to unionize. It has, however, never been addressed in any litigation on workfare. Moreover, although the section clearly operates to protect the right to associate, it has only infrequently been called upon to protect the negative right not to be organized.

The jurisprudence on s.2(d) has discussed the importance to the individual of her work and employment. Dickson C.J.C., in *Reference Re Compulsory Arbitration*, held that:

Work is one of the most fundamental aspects of a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. *A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect* [emphasis mine].⁸⁷

An argument can be made that by obliging someone to participate in a work program in which there is little, if any, choice as to the type of work to be completed amounts to a violation of the self-respect and emotional well-being protected by s.2(d).

Courts have been reluctant to give s.2(d) a broad positive reading tantamount to constitutionally protecting the right of a citizen to work in the field of her choice and not be limited by regulatory arrangements such as licenses.⁸⁸ Nevertheless, this is not the aspect of s.2(d) that is impinged by workfare schemes.⁸⁹ Rather, workfare touches on what is arguably a negative right to be

87. (1987), 74 N.R. 99 at 194 (S.C.C.). Despite the fact that these comments were made in dissent, they have subsequently found wide approval on the Court. For example, Iacobucci J., writing for the majority in *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 directly affirmed Dickson C.J.C.'s words.

88. In terms of s.7's application to this point, consult *Wilson v. B.C. (Medical Services Commission)* (1988), 30 B.C.L.R. (2d) 1 (B.C.C.A.), leave to appeal to S.C.C. refused [1989] 3 W.W.R. 1xxi. However, s.2(d) has been interpreted to protect the right to join together with others so as to gain a livelihood: *Martin et al. v. B.C. (A.-G.)* (1988), 53 D.L.R. (4th) 198 (B.C.S.C.).

89. Interpreting s. 2(d) in the way suggested by this article does not mean that people who simply find their labour market participation to be prosaic and disconnected from their

free from coerced association in work relations that categorically fail to respect the dignity of the unwilling participants. Naturally, if participation in these programs were genuinely free from *any* direct or indirect coercion then s.2(d) would not be infringed.

The principal obstacle in the path of the successful litigation of this point is found in the decision of the Supreme Court of Canada in *Lavigne v. O.P.S.E.U.*⁹⁰ This case involved the claim by a member of a bargaining unit that s.2(d) guaranteed him the right not to be required to be associated with a union. The Court split on the issue as to whether s. 2(d) enshrined a negative right not to associate. Wilson J., for the majority, held that the *Charter* did not provide such a right; in fact, s.2(d) was not intended to permit citizens to extricate themselves from all associations they deem to be undesirable. On the other hand, La Forest J., with whom Sopinka and Gonthier JJ. concurred, concluded that s.2(d) did provide a negative right from forced association; nevertheless, on the particular facts of the *Lavigne* case he deemed this rights violation to constitute a reasonable limit under s.1. The minority submitted that the essence of freedom of association is the protection of the individual's interest in self-actualization and fulfilment that can be realized only through combination with others. Since forced association will stifle this interest of the individual as surely as voluntary association will develop it, freedom from compelled association is recognized under s.2(d).

Upon closer analysis, even the majority decision in *Lavigne* does not preclude a finding that mandatory workfare violates s. 2(d). In her judgment, Wilson J. was concerned that finding a broad right not to associate would undermine many of the social units—such as unions and families—that are integral to Canadian society. Mandatory workfare cannot be equated with these units. Moreover, unlike with a union, a workfare program does not permit its individual members the democratic right to vote, nor participate in any decision-making. To this end, a workfare program is a significantly more coercive organization than a union.⁹¹

individuality can claim constitutional entitlement to employment promoting their self-worth and identity. The key difference between such persons and workfare participants is the degree of compulsion faced by persons subject to workfare.

90. [1991] 2 S.C.R. 211.

91. Recipients have no realistic choice whether to participate in workfare, given that failure to participate shall likely push the recipient below the minimal subsistence level. In *Merry v. Manitoba*, [1989] 6 W.W.R. 665 (Man.C.A.), the Court left open the question as to whether an obligation to be a member of an association could constitute a violation of s. 2(d). Although in all likelihood the obligation imposed on many professionals to join occupational associations (for example the Law Society of Upper Canada) does not infringe the *Charter*, the different nature of workfare could induce a 2(d) violation.

This fact might be sufficient not only to distinguish *Lavigne*, yet also to place workfare within the scope of s.2(d).

(b) Section 7

There are two steps to establishing a breach of s.7: it must firstly be shown that the state has interfered with the life, liberty and security of a citizen or class of citizens. Secondly, the court must be satisfied that this interference was not made in accordance with fundamental justice. Thus, although incarcerating a murderer affects his liberty, if the incarceration arose after a fair trial then it shall pass constitutional muster since it was made in accordance with fundamental justice.

(i) *The initial threshold: workfare's impact on the liberty and security of the person*

Workfare arguably involves an intrusion into the liberty of the welfare recipient. Beneficiaries of social assistance are under state surveillance, obliged to work, attend classes, and search for employment. Their involvement in the workfare activity may very well be against their will, yet they remain obliged to participate, on penalty of having their subsistence income eliminated. Germane to this discussion is the fact that *Charter* jurisprudence holds that the "liberty" interest in s. 7 encapsulates more than just freedom from bodily and psychological restraint.⁹² According to Wilson J. in *R. v. Jones*:

I believe the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric—to be in today's parlance "his own person" and accountable as such [emphasis mine].⁹³

92. *Singh, supra*, note 86. In *Camire v. City of Winnipeg* (1989), 57 Man.R. (2d) 192 (C.A.), a "self-admitted binge alcoholic" claimed that a requirement to stay in a "dry" treatment centre in return for assistance from the City violated his s. 7 rights. The Court perfunctorily dismissed the allegation. *Camire* is readily distinguishable from rights deprivations arising under workfare: (1) *Camire* voluntarily chose to obtain the assistance; (2) the treatment centre also doubled as a transitional home and *Camire* needed supervision for his antisocial behaviour; (3) the assistance from the City was not the ultimate last resort for *Camire*, as he was ostensibly eligible for welfare.

93. (1986), 31 D.L.R. (4th) 569 at 582. Although Wilson J. wrote this passage in dissent, the spirit of her comments have, in more recent years, been adopted by other members of the Supreme Court. For example, Lamer J., speaking for himself in *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 held at 1177-8 that:

"I am of the view that... s. 7 is implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity. *S. 7 is implicated*

In so far as workfare interferes with the individual's freedom of movement as well as her right to self-determination it can be said to infringe the initial threshold of s. 7. Participants are denied their right to "plan their own lives to suit their own characters". Moreover, as discussed in section C(1) of this article, the Supreme Court has held that "security of the person" includes the right to be free from threats related to one's physical or psychological well-being.⁹⁴ Threatening to remove a subsistence income from a person in need should she, on a strict liability basis, not be able to fulfil workfare requirements arguably amounts to a menace to that person's emotional and physical integrity sufficient to trigger the application of s.7.

(ii) *Is the Rights Deprivation Consonant With Fundamental Justice?*

Section 7 will permit the right to liberty and security of the person to be deprived if this deprivation is made in accordance with fundamental justice. The term "fundamental justice" has a fluid definition and broadly refers to the basic principles and values underpinning the Canadian legal system. There is both a procedural and substantive aspect to fundamental justice.⁹⁵

when the state, either directly or through its agents, restricts certain privileges...by using the threat of punishment in cases of non-compliance. [emphasis mine]"

In *Big M Drug Mart Ltd.*, *supra*, note 67, Dickson C.J.C., while discussing the meaning of the term "freedom" under the *Charter*, held for the majority at 336-7 that:

"Freedom can primarily be characterized by the absence of coercion or constraint. *If a person is compelled by the state...to a course of action... which he would not otherwise have chosen, he is not acting of his own volition and cannot be said to be truly free.* One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. *Coercion includes...indirect forms of control which determine or limit alternative courses of conduct available to others.* [emphasis mine]"

94. *Singh*, *supra*, note 86; *Morgentaler*, *supra*, note 66. In *Morgentaler*, Dickson C.J.C. held at 401 that "...state interference with bodily integrity and serious state imposed psychological stress, at least in the criminal context, constitute a breach of security of the person." The question remains open whether this statement from *Morgentaler* applies to a civil administrative scheme such as workfare. Morrison, *supra*, note 70 at 24 responds to this point by noting that "...the criminal law is not the only means by which serious coercive pressure can be brought to bear on the individual and it would be unreasonable to suggest that criminal sanctions are invariably more severe in consequences than other forms of state action." On another note, Wilson J. (writing for herself) in *Morgentaler* at 486 concluded that security of the person covers the right of an individual to make important decisions related to her person independently of state intervention. A person's choice of where and how to work could clearly fall under such a right.

95. *Motor Vehicles Reference*, *supra*, note 82 at 487, *per* Lamer J.

(iii) *Substantive Fundamental Justice*

Fundamental justice imposes substantive limits on what the state can do in implementing legislative schemes. In the celebrated words of Lamer J. in the *Motor Vehicles Reference*, governmental initiatives must remain within the boundaries of "...the elements of a system for the administration of justice which is founded upon the belief in the *dignity and worth of the human person* [emphasis mine]."⁹⁶ It is the principle of human dignity that is key to the constitutionality of working for welfare. Workfare schemes such as those implemented by Saskatchewan and Manitoba in the mid-1980's (in which participants were forced to clear brush, clean parks, and build roads) can be said to violate the principle of human dignity central to fundamental justice. To this end, s.7 could render unconstitutional certain absolute "work for welfare" schemes that formerly existed in this country and continue to exist in the United States. Lucie Lamarche of the Université du Québec takes this analysis one step further by suggesting that s.7 might even render impermissible workfare programs that, instead of enhancing employability, oblige recipients to work simply for the sake of working:

En matière de sécurité du revenu, il faudrait vérifier l'effet de l'absence de choix de comportement des bénéficiaires envers le marché du travail, celui de la nature des programmes offerts ainsi que leur objectif réel, les conséquences psychologiques et physiques sur les bénéficiaires du montant de l'allocation et la gestion des pénalités. *La justice fondamentale ne serait pas adéquatement servie si un programme qui se veut un indicatif à l'employabilité n'est en réalité qu'une façon déguisée de contraindre les bénéficiaires à n'importe quel travail* et ultimement, un outil de contrôle social [emphasis mine].⁹⁷

Nevertheless, given the conceptual fluidity of fundamental justice, a carefully designed workfare program that minimally infringes the "liberty" or "security" of the participants might not be found to violate the *Charter*. Since violations of s. 7 will rarely, if ever, be upheld under s.1,⁹⁸ the fundamental justice component of s. 7 has developed into a semblance of a s. 1 analysis.⁹⁹ For this

96. *Ibid.* at 503.

97. Lamarche, *supra*, note 47 at 361.

98. Wilson J. (concurring) in *R. v. Swain*, [1991] 1 S.C.R. 933 at 1034: "It would be a rare provision which violate[s] the principles of fundamental justice and could nevertheless be justified under s. 1". P.W. Hogg, in *Constitutional Law of Canada* 3rd ed. (Toronto: Carswell, 1992), para. 35.14(c), p. 886, notes that no such infringement has ever been justified as a s. 1 "reasonable limit".

99. An illustration of the similarities in determining whether "fundamental justice" or "reasonable limits in a free and democratic society" can operate to validate an impugned statutory instrument is provided by McLachlin J.'s judgment in *R. v. Kindler* (1992), 67

reason, many of the issues raised in section D of this article (dealing with s.1) are pertinent to the discussion of whether workfare satisfies fundamental justice (for example, the extent to which the scheme is rationally connected to valid policy objectives while minimally impairing the participants' rights). These issues shall not be repeated here.

(iv) *Procedural Fundamental Justice*

Even if the subject matter of the state intervention is not constitutionally protected, the *Charter* still serves to monitor the manner in which the state intervenes. To this end, once the state has voluntarily created a privilege related to the well-being of its citizens—such as the allotment of social assistance—it may be constitutionally constrained in the way it deals with these privileges or decides to discontinue them.¹⁰⁰

There are a plethora of reasons why persons—fully apprised of the fact that participation is obligatory—fail to satisfy the requirements set out by workfare programs. For example, research has revealed that some participants simply felt the assignment given them was impossible to fulfil for medical reasons, transportation problems, or child-care difficulties.¹⁰¹ Others noted that their task was simply unconnected to any long-term employment prospects and believed they could do better by conducting their own personal job search. Some recipients are pushed onto welfare dependency because they find themselves at a crisis point in their lives and feel they must resolve their personal problems before embarking on job training. It is submitted that, should workfare programs be enacted in Canada, the procedural guarantees of s. 7 require the provision of hearings to determine the reasons for the failure to participate before any welfare benefit is cut off.¹⁰² Moreover, the recipient could be entitled to written or oral notice¹⁰³, discovery of the State's case, rights to appeal¹⁰⁴, and possibly the assistance of counsel.¹⁰⁵ Social assistance legislation

C.C.C. 1 (S.C.C.).

100. *Singh, supra*, note 86, *per* Wilson J.

101. "New Research Report on Workfare", *supra*, note 27 at 333. See also the decision of the United States Supreme Court in *Goldberg v. Kelly* (1970), 397 U.S. 254.

102. It is most important to couple this rights protection with public awareness and education so that the claimant can get through the "naming, blaming, claiming" stages once their benefits are terminated in a manner they perceive to be unfair.

103. In the decision of the Supreme Court of Canada in *Lakeside Hutterite Colony v. Hofer*, [1992] 3 S.C.R. 165 at 195, it was held that notice is a "most basic requirement" of fundamental justice, e.g., see s. 13. of the Ontario *Family Benefits Act*.

104. So that the administrator's decision is reviewable.

105. In *Howard v. Stony Mountain*, [1984] 2 F.C. 642 at 663, the Federal Court held that the

already provides many of these elements of due process for cases of welfare termination, and advocates for the poor must ensure that they are equally applied to termination based on an alleged derogation of workfare responsibilities.

It is settled law that due process and procedural fairness are to be contextually defined.¹⁰⁶ The number and nature of procedural safeguards sufficient to enable an administrative decision-making process to comply with fundamental justice depends on the extent to which the individual subjected to this process can be prejudiced by its outcome. It is clear that termination or reduction of welfare benefits can have serious repercussions on the security and physical integrity of the recipient and her family. To this end, the recipient ought to be entitled to a fairly high level of procedural protection in order to ensure that the welfare administrator makes an informed decision in which the risk of error or unfairness is minimized. This is especially important in cases of termination of social assistance on account of an alleged failure to participate in a workfare program since persons cut off for failure to participate will almost always still be in need, unlike (for example) those cut off due to the fact they may have acquired an additional source of income and are thus no longer as “needy”.¹⁰⁷

right to counsel emerges when a person is in a situation where the consequences of the decision she faces are severe and she might not have sufficient “aptitude” to understand and present her case.

106. *Singh, supra*, note 86; *The Queen v. Wholesale Travel*, [1991] 3 S.C.R. 154 at 226, *per* Cory J.

107. Although the *Charter* can ensure that the decision to terminate benefits complies with certain procedural safeguards, what it cannot do is ensure that recipients are treated with respect and dignity. Social assistance recipients already face stigma and stereotype. Michael Ignatieff eloquently addresses this issue in *The Needs of Strangers* (New York: Viking Press, 1985):

“The relation between what we need in order to survive and what we need in order to flourish is...complicated. Giving the poor their pension and providing them with medical care may be a necessary condition for their self-respect and their dignity, but it is not a sufficient condition. Respect and dignity are conferred by...gestures too much a matter of human art to be made a consistent matter of administrative routine.

(See also: J.D. Moon, “The Moral Basis of the Democratic Welfare State” in Gutmann (ed.), *Democracy and the Welfare State* (Princeton U. Press, 1988). The importance of attentiveness and sensitivity in the determination of ineligibility in cases of unfulfillment of workfare requirements should not be understated. Yet Ignatieff’s words also raise a broader issue. If it is the “manner of giving” that counts, what type of dignity and self-respect is conveyed when the allocation of social assistance is accompanied by and contingent on mandatory work requirements?

(c) Section 8

Another issue is the limits the *Charter* might impose on the ability of welfare inspectors to verify whether recipients are conducting themselves in accordance with the statutory requirements for eligibility. Any search or monitoring procedures that are unreasonable might amount to violations of s. 8 of the *Charter*.¹⁰⁸ One example of state action that might be susceptible to a s. 8 violation is a program inaugurated in Québec in 1993 in which inspectors randomly check up on welfare recipients in their homes in order to determine eligibility.¹⁰⁹

(d) Section 15

Section 15(1) provides that every person has the right to equal benefit and protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The appropriate test to determine the existence of a s. 15 violation is set out in *Andrews v. Law Society of British Columbia*.¹¹⁰ There are two levels of analysis. Firstly, the impugned legislation must, directly or indirectly, create a distinction between persons that, in turn, denies some of those persons equal benefit of or equal treatment before or under the law. Secondly, the distinction must involve a prohibited ground of discrimination. There are two types of prohibited grounds: those enumerated in s.15 and those analogous to these enumerated grounds. These two grounds frequently cover groups who have faced historical or structural disadvantage which has rendered them "discrete and insular minorities".¹¹¹

In the earlier discussion, this article focused on the ways in which workfare affected the social assistance recipient in her capacity as an individual. A s. 15 analysis, on the other hand, permits the systemic inequities of workfare to be laid bare.

108. Section 8 states that: "Everyone has the right to be secure against unreasonable search or seizure".

109. Margaret Philp, "What are Welfare Cheats?", *Globe and Mail* (30 March 1994). The Québec government claimed that the inspectors saved the province \$80 million in eliminated fraud and errors (10 times the cost of maintaining the inspectors). However, three Université de Montréal professors have estimated that the province saved just \$10 million as a result of the inspectors' work, while the cost of maintaining the inspections hovered around \$9 million: J. Gow et al., "Choc des valeurs dans l'aide sociale au Québec? Pertinence et signification des visites à domicile" (U. de Montréal, 1993) [unreported].

110. [1989] 1 S.C.R. 143.

111. *Ibid.* at 183; *R. v. Turpin and Siddiqui*, [1989] 1 S.C.R. 1296 at 1332.

Workfare denies social assistance recipients equal treatment under the law in so far as it subjects them to behaviour manipulation in order to continue to receive financial support from the state whereas the state is not equally coercive in manipulating the lives of other recipients of resources from the state (for example, the predominantly middle-class recipients of business grants and student bursaries).¹¹² More graphically, learnfare imposes a burden on the welfare recipient in an effort to oblige her children to attend school without imposing a similar burden on the middle class while failing to inquire whether children of the poor demonstrate a greater propensity for truancy than do children of the middle classes. Non-welfare parents simply receive a tax-break for every child, not conditioned on any behavioural characteristics such as school attendance. Lucy Williams cites a poor mother:

All my sons skipped school more than twice a month. Did my sons graduate? Yes. Did they get jobs? Yes. Could I keep them in school by threatening them? No. I discovered that my sons played hooky at the homes of their friends, who had employed parents and VCRs. Though their friends skipped school and harbored truants, neither they nor their parents suffer from the learnfare "experiment". Class status, not truancy alone, determined who would be abused by learnfare.¹¹³

It remains to be seen whether the aforementioned distinctions created by workfare schemes are discriminatory in nature or effect. At this level of analysis courts have developed two definitions of discrimination for the purposes of s. 15: "direct" and "adverse impact". An example of direct discrimination would be a disclaimer on an advertisement for a police officer's position that stated "no women should apply". Section 15 would be directly touched by such activity. Yet, what about a disclaimer that read "only persons over 6 feet in height should apply"? Although, at first blush, such a proviso does not directly affect any group enumerated in or analogous to those in s. 15, upon closer analysis there is an indirect discriminatory effect upon women because a much smaller percentage of women than men are over 6 feet in height. Such a method of analysis is labelled "adverse impact discrimination". It applies in disregard of the question whether the employer had any intention to discriminate in the first place.¹¹⁴

112. Social Planning Council of Metro. Toronto, "Welfare Reform in Ontario: Turning POINT or Turning BACK?" (Toronto: August 1993) notes that: "When people fear for their subsistence, they accept onerous and dangerous working conditions. They work harder, and they work longer. They more readily accept discipline, follow orders, and submit to humiliation."

113. L. Williams, "The Ideology of Division: Behaviour Modification Welfare Reform Proposals" (1992), 102 Yale L.J. 719 at 735.

114. *O'Malley v. Simpson-Sears*, [1985] 2 S.C.R. 536 at 547.

Although in early years of *Charter* jurisprudence the Supreme Court of Canada utilized adverse impact analysis in a purposive manner¹¹⁵, this enthusiasm has waned. At present, the Supreme Court is rather taciturn about applying adverse impact within the context of economic rights. One example of this is the 1993 decision in *Symes v. The Queen*.¹¹⁶ In *Symes*, the Court was faced with a claim that the inability of taxpayers to deduct child-care costs as a business expense amounted to adverse impact sex discrimination, given that women bear the brunt of child-care responsibilities in Canadian society. Iacobucci J., writing for the majority, rejected the claim. He held that, although he was satisfied that women disproportionately incur the *social* costs of child-care, the evidence did not reveal that women disproportionately *pay* more for child-care. Since the *Income Tax Act*¹¹⁷ had nothing to do with the distribution of the social cost of child-care, merely with the financial cost, it could not be said to be in violation of the *Charter*.¹¹⁸ The narrow approach of the *Symes* decision elevates the degree of social science evidence that shall have to be presented in order to convince a court of the existence of adverse impact discrimination. On a related note, it shall be interesting to see how the Supreme Court applies the *Symes* reasoning when it considers the *Thibaudeau* case.¹¹⁹ At the Federal Court of Appeal¹²⁰, Thibaudeau's claim that her s. 15 rights were violated by the *Income Tax Act*'s inclusion/deduction system of alimony and child-care payments (s. 56(1)(b)) was successful. The Court found that s. 56(1)(b) offended the rights of *single custodial parents* to equality under the law. More germane to this discussion, however, is the fact that the Court rejected a submission that s. 56(1)(b) amounted to adverse impact sex discrimination because women tend (1) more frequently to be custodial parents than men and, (2) disproportionately compose the group receiving support payments. Hugessen J. held that:

S. 56(1)(b) impacts adversely on more women than men...Since, however, the legislation must also impact in exactly the same way on custodial fathers, although in very much smaller numbers, I do not see how it can be said to differentiate or to discriminate on the basis of sex...It cannot be that legislation that

115. *Ibid.* See also *Action Travail des Femmes v. C N R*, [1987] 1 S.C.R. 1114.

116. [1993] 4 S.C.R. 695.

117. R.S.C. 1952, c. 148 [am. 1970-71-72, c. 63].

118. *Symes*, *supra*, note 116 at 764-5.

119. Heard by the Supreme Court on Tuesday, October 4, 1994.

120. [1994] F.C.J. No. 577.

adversely affects both men and women is discriminatory on the grounds of sex solely because the women in question are more numerous.¹²¹

If the Supreme Court affirms Hugessen J.'s conclusion, the nature of adverse impact jurisprudence in Canada shall be significantly altered. It will be more difficult to categorize groups as adversely affected, since it is extremely rare that all members of a group claiming adverse impact will be traditionally disempowered people. Nevertheless, as shall be discussed *infra*, there are indications in the *Symes* judgment that the Supreme Court is not prepared to take quite such a restrictive view of s.15.

This reluctance to purposively apply adverse impact analysis in the area of economic rights is not shared by all of the highest courts of the provinces. The decision of the Nova Scotia Court of Appeal in *Re Dartmouth/Halifax County Regional Housing Authority and Sparks*—released after *Symes* in March 1993—found that a provincial statute setting shorter notice periods in cases of termination of public housing tenancies than would apply to tenants in private accommodation violated s. 15.¹²² The Court found that “public housing tenants” were predominantly composed of people of colour, sole-support mothers, and elderly and disabled persons. Due to this fact, the unequal treatment touched upon groups covered by s. 15. The *Sparks* decision is interesting since, although the Court used an adverse effects approach, it unequivocally held that “...it is not necessary [in order to find discrimination in this case] to show adverse effect discrimination.”¹²³ In other words, the court held that public housing tenants constituted an analogous group in their own right, this status flowing from the other sources of disadvantage common to many members of the group. To this end, *Sparks* constitutes judicial authority for an argument that workfare participants, due to their socio-economic characteristics, would form a group directly protected by the *Charter*. Unfortunately, there are difficulties in applying such an argument: whereas in *Sparks* there were two clearly identifiable groups—public and private tenants—both of which were differently treated by legislation, it is unclear to whom workfare recipients would be compared in terms of a group suffering differential treatment, unless there were evidence that those persons on social assistance signalled out for workfare placement disproportionately tended to be women, people of colour or members of other disadvantaged groups.

121. *Ibid.* at paras. 22 and 26.

122. (1993), 101 D.L.R. (4th) 224 [hereinafter *Sparks*].

123. *Ibid.* at 232.

(i) *Direct Discrimination: Receipt of social assistance as an analogous ground of discrimination under s. 15*

An argument can be made that workfare violates s.15 because it discriminates directly against persons on social assistance.¹²⁴ In order for such an argument to be successful, it must first be established that receipt of social assistance constitutes a ground of discrimination analogous to the grounds enumerated in s.15(1).¹²⁵

Some courts, such as in *Gosselin v. Québec*, have unequivocally rejected such a proposition.¹²⁶ Others, such as the Nova Scotia Court of Appeal in *Sparks* have remained more coy on this issue¹²⁷; the British Columbia Supreme Court has actually held that "...it is clear that persons receiving income assistance constitute a discrete and insular minority within the meaning of section 15".¹²⁸

124. Or, more generally, against poor persons. It appears more difficult to argue that poverty is an analogous ground, although some scholars have made compelling arguments in this regard: see S. Turkington, "A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism" (1993), 9 J.L. & Soc. Pol'y 134. Given the focus of this essay on workfare programs (in which membership is not based on poverty but one's status as a welfare recipient) the s.15 argument shall be limited to receipt of social assistance as a ground of discrimination.

125. There is some human rights protection available for persons in receipt of social assistance. For example, the Ontario Human Rights Code, R.S.O. 1990, c. H-9 precludes discrimination against persons receiving social assistance in the allotment of accommodation, but the Code excludes "receipt of social assistance" from the precluded grounds of discrimination in the broader areas of the provision of services and employment. Both the *Nova Scotia Human Rights Act*, R.S.N.S. 1989, c. 214 and the *Manitoba Human Rights Code*, S.M. 1987-88, c.45, s. 9 also view "receipt of public assistance" and "source of income" as constituting prohibited grounds of discrimination in certain limited contexts.

126. *Supra*, note 11.

127. Although in *Sparks, supra*, note 122 at 232 the Court of Appeal stated that the tenants were discriminated in part due to their "income", the Court did not rely solely on "income" as a ground for discrimination, viewing it as merely one factor, when coupled with gender, race and age, that allowed "public housing tenants" to constitute an analogous group under s. 15.

128. *Federated Anti-Poverty Groups v. B.C. (A.G.)* (1991), 70 B.C.L.R. (2d) 325 (B.C.S.C.). Ever since the *Andrews* decision, finding that a group constitutes a "discrete and insular minority" is strong evidence that such a group is entitled to the protection of s. 15. The Tax Court of Canada has found that poverty can be a personal characteristic for the purposes of inclusion as an unenumerated ground of discrimination under s.15: *Schaff v. Canada* (August 5, 1993), Action No. 92-1054 (IT) (T.C.C.) [unreported]. It was held at 16 that a poor, single, female divorced parent was part of a discrete and insular minority and that poverty was a "personal characteristic that can form the basis of discrimination." *Schaff* also found that there is some room for economic rights within the meaning of "security of the person" in s.7. This case involved the unsuccessful claim by a custodial parent that the taxation of child support payments violated both sections 7

Nevertheless, given the splintered state of the jurisprudence, it might be more illuminating to address some of the arguments in favour of placing persons in receipt of social assistance under the protective umbrella of s.15.

It is clear that persons receiving social assistance lack political influence. This lack of influence is exacerbated by the fact that they do not stand independently from the state, but are bound by necessity to lean against the state for survival. It is this element of material dependence that places social assistance recipients in a particularly vulnerable position. Ian Johnstone observes that "...manipulation of the power to withhold the means to basic sustenance poses special dangers for personal integrity".¹²⁹ If the goal of s.15 is to remedy or prevent discrimination against such vulnerable groups, then including social assistance recipients among the protected classes of persons can help ensure that the equality provision of the *Charter* is given full effect.

Welfare recipients are also the victims of stereotype and stigma, as is evidenced in the following passage from Lawrence Mead:

The basic fact about [welfare recipients] is that they live under the authority...of the welfare department, and *they need to take direction from that authority because they themselves don't have it as clearly in mind as many other people as to what they are supposed to do...* But the recipients are different enough from the rest so that they in fact accept [work requirements] and it fills a need they have.¹³⁰

This stereotype operates even though much of the responsibility for being on social assistance must be attributed not to the recipient, yet to the structure of capitalist society. In a sense, those benefitting from the capitalist system justify it on the basis that the "have-nots" who "fall through the cracks" do so on account of their own personal shortcomings, and not because the system itself is replete with cracks through which some persons shall fall regardless of any lack of personal enterprise or motivation. As Sheilagh Turkington notes, "...incorrect assumptions about poverty [are translated] into assumptions about the people who are poor."¹³¹ In fact, much of the rhetoric supporting the implementation of workfare schemes is based on the unproven assumption that social assistance recipients are lazy, unmotivated and in need of a "shock to their

and 15.

129. Johnstone, *supra*, note 4 at 27. In favour of this proposition, Johnstone cites Charles Reich: "A power over a man's subsistence amounts to a power over his will."

130. Mead, *supra*, note 17 at 36-41, 99.

131. Turkington, *supra*, note 124 at 141.

system" in order to become productive members of society. In terms of learnfare, there is a false assumption that teenagers in poor families are more likely to be truant than teenagers from middle-class families;¹³² another misconception that spins from this assumption is that parents on social assistance somehow do not want the best for their children.

Many of the grounds enumerated in s.15 involve immutable characteristics. For example, it is difficult to change one's gender and impossible to change one's race or age.¹³³ Similarly, an argument can be made that poverty is an immutable trait. Marc Gerber notes, in the American context, that surveys conclude that "...the odds for moving from the bottom 20% in income distribution to the top 40% are 1 in 10."¹³⁴ Another study cited by Gerber found that of twenty year-olds starting in the bottom quintile, three-quarters were there thirty years later and virtually none had moved to the top.¹³⁵ Given this empirical research, Gerber concludes that wealth appears to be a quasi-immutable trait. As such, he sees no reason why it should not constitute a prohibited ground of discrimination.

Gerber's analysis offers an interesting perspective as to why poverty should be treated as an analogous ground under s. 15. Nevertheless, there are certain shortcomings to his analysis. The principal weakness is the focus on the necessity of proving immutability on an individual level. Even though many prohibited grounds of discrimination are in fact "immutable", why should "immutability" be required in order for a characteristic to be deemed to be an analogous ground under s. 15(1)? Such an approach sets a finite limit to the number of prohibited grounds, and fails to recognize that conditions such as illiteracy, drug dependency and alcoholism (none of which are necessarily immutable traits) are often used to justify treating people differently in a *prima facie* discriminatory manner.

132. Weinberg, *supra*, note 5; Williams, *supra*, note 113 at 733 found that, in the United States, children of AFDC families miss 3 more days of school per year than children of non-AFDC families.

133. The term "disability" has also traditionally been interpreted as covering those physical and mental impairments over which the individual has no control; the popularity of this approach is, however, on the wane.

134. Marc Stuart Gerber, "Equal Protection, Public Choice Theory, and Learnfare: Wealth Classifications Revisited" (1993), 81 Georgetown L. J. 2141 at 2161. Gerber relies on U.S. socio-economic data which may not reflect social mobility in Canada. Nevertheless, despite this important limitation, Gerber's findings and their application to human rights law still remain instructive.

135. *Ibid.*

However, if the “immutability” approach is to be followed, one way to make it more sensible in the workfare context is to view unemployment not as an immutable characteristic of the unemployed person, but rather of capitalist society. Such a perspective can encourage broader reforms to the Canadian political economy geared towards alleviating poverty not only on an individual basis, yet also on a systemic level.

A finding that social assistance recipients are entitled to s. 15 protection has broad ramifications that go beyond obligatory workfare programs. For example, a non-coercive workfare scheme (one in which participation is purely voluntary and unconnected to the continued receipt of benefits) could be precluded from being exempted from workplace regulations that apply to all employees in the labour market. In other words, the state would be mandated to ensure that persons in such programs benefit from the same occupational health and safety rules, human rights guarantees, and minimum wage requirements than all other employees. Constitutional litigation in this area could also affect the environment in which and conditions under which other groups of quasi-conscripted labour (prisoners and psychiatric patients) are made to work.¹³⁶

(ii) *Disparate Impact Analysis*

Even if the claim that receipt of social assistance constitutes an analogous ground under s. 15 fails, workfare can still be challenged on the basis of an adverse impact analysis. Key to the applicability of adverse impact to the workfare context is recognition of the fact that:

The poor are not a random selection of individuals who have fallen on hard times, but rather tend to belong to particularly vulnerable groups or groups traditionally disadvantaged in other ways—sole support single parents (usually women), the elderly (especially elderly women), the physically and mentally disabled, Native people and, most disturbingly, a high proportion of dependent children.¹³⁷

Although the preceding passage reveals that many traditionally disadvantaged groups would be affected by workfare, this article shall not consider the potential claims of all of these groups.¹³⁸ Instead, attention shall only be focused on two groups.

136. For a discussion of the constitutionality of a provincial regulation exempting employers from paying patients in psychiatric institutions less than the minimum wage in exchange for their work, consult *Fenton v. B. C. (Forensic Psychiatric Services Commission)* (1989), 29 C.C.E.L. 168 (B.C.S.C.), reversed on appeal (1991), 82 D.L.R.(4th) 27 (B.C.C.A.).

137. Morrison, *supra*, note 70 at 29.

138. Such a comprehensive review is outside the scope of this article.

(iii) *Effects on single mothers*

As discussed earlier, the *Symes* case appears to make it more difficult for women—despite their status as an enumerated group—to claim that, based on an adverse impact analysis, the state engaged in a pattern of discrimination in the allotment of economic privileges. Nevertheless, the door is far from closed. In his decision Iacobucci J. was careful to point out that:

In another case, a different subgroup of women with a different evidentiary focus...might well be able to demonstrate the adverse effects required by s. 15(1). For example, I note that no particular effort was made in this case to establish the circumstances of single mothers. *If, for example, it could be established that women are more likely than men to head single parent households, one can imagine that an adverse-effects analysis involving single mothers might well take a different course, since the child-care expenses would thus disproportionately fall upon women* [emphasis mine].¹³⁹

It is along these lines that the most fruitful constitutional challenges of workfare might operate. In the United States, it is AFDC recipients, the majority of which are single mothers, that are most vigorously singled out for workfare programs.¹⁴⁰ A similar situation is found in Canada.¹⁴¹ For example, in Ontario the *Transitions Report* recommended that sole-support parents (as well as adolescent mothers and victims of family violence¹⁴²) be specifically targeted for “opportunity planning”.¹⁴³ New Brunswick’s N.B. Works Program is similar in this regard. When coupled with the passage from *Symes* above, the following

139. *Symes, supra*, note 116 at 766-7.

140. Weinberg, *supra*, note 5 at 421 and 439. Although it seems plausible that people of colour and persons of the First Nations also compose a disproportionately large part of social assistance recipients (and that it might be possible to allege a s.15 violation on account of race), this issue merits independent attention and is too important to be compressed within the limits of this article.

141. Smart, *supra*, note 10 at 226 notes that 30% of social assistance recipients in Ontario are sole support parents, and 85% of these are women. Sole support mothers and their children together constitute about 37% of all social assistance beneficiaries. As to the ability of such numbers to trigger an adverse impact sex discrimination finding, it is useful to once again turn to the decision of the Iacobucci J. in *Symes, supra*, note 116 at 767: “As...my comments...relating to single mothers imply, if I were convinced that [s. 63] has an adverse effect upon *some* women...I would not be concerned if the effect was not felt by *all* women. *That an adverse effect felt by a subgroup of women can still constitute sex-based discrimination appears clear to me from a consideration of past decisions* [emphasis mine].”

142. Overwhelmingly women.

143. *Transitions Report, supra*, note 1 at Recommendation 75.

citation from the *Sparks* decision offers persuasive judicial authority that single mothers should benefit from and merit the protection of s. 15:

Single mothers are now known to be the group in society most likely to experience poverty in the extreme. It is by virtue of being a single mother that this poverty is likely to affect the members of this group. This is no less a personal characteristic of such individuals than non-citizenship was in *Andrews*.¹⁴⁴

Despite their disproportionate numbers in workfare programs, it is unfortunate that the specific needs of single mothers often remain unaddressed.¹⁴⁵ One example is the provision of childcare. It is clear that, without the existence of state-sponsored childcare, a single poor mother will find it more difficult to regularly attend work or training programs than will recipients without children.¹⁴⁶ If the workfare scheme is punitive in nature—punishing the delinquent participant with reduced or eliminated social assistance benefits—then this scheme shall have a discriminatory impact on single mothers and women in general. To this end, workfare schemes (such as GAIN or N.B. Works) that incorporate free child-care shall have a greater chance of surviving the scrutiny of s.15.

More generally, despite the fact that women are overrepresented in the ranks of workfare participants, there is evidence that workfare programs have favoured men in the allocation of scarce jobs.¹⁴⁷ There is also evidence that training and job searches orient women to jobs in traditional “women’s work”¹⁴⁸ “pink

144. *Sparks, supra*, note 122 at 233-4.

145. Weinberg, *supra*, note 5 at 440.

146. Another concern is that women also take a disproportionately large responsibility of caring for infirm parents, this care-giving increasing in importance as the “baby boomers” progressively age.

147. Rochman, *supra*, note 3 at 214, in her survey of workfare programs in the United States, found that “...women were less likely to be placed in jobs.” At 208, she notes that Congress overtly indicated that priority should be given to unemployed men in terms of participation in training and jobs. American evidence is of limited use in Canada, yet the demographics of social assistance recipients in both countries are sufficiently similar to justify the conclusion that, were U.S.-style workfare schemes to be introduced in Canada, many of the effects on the participants (in this case, the women), would be analogous. In the least, a comparative analysis with the U.S. shows what workfare designers in Canada should *not* do. Perhaps if many of the shortcomings common to the U.S. programs were avoided, workfare initiatives in Canada might not only be more effective, yet also more respectful of constitutional exigencies.

148. Weinberg, *supra*, note 5 at 441 concludes that most of the jobs provided to women as part of the obligatory workfare “...seem to be clustered in traditional areas of ‘women’s work’, for example as caretakers for children and the elderly in day care centres and nursing homes, food service work, and or cleaning services.”

collar" sectors in which wages and benefits are lower than for traditional "men's work".¹⁴⁹ In this sense, workfare exacerbates traditional market inequalities and contributes to the feminization of poverty:

While [workfare] programs increasingly tend to draw female recipients of welfare programs into the mandatory work net...rather than enabling women to enter the workplace with a full earnings potential, these programs are often structured so as to tie women to low-end jobs, at low pay, and often of temporary duration.¹⁵⁰

Learnfare triggers similar constitutional issues. It could also have a discriminatory impact on women since they, head the majority of sole support parent families on social assistance and bear the financial and emotional costs commensurate with such responsibilities. Single mothers shall thus bear a disproportionate brunt of state sanction in terms of termination of welfare benefits even though, as discussed *infra*, the actual ability of these parents to ensure that their child attends school might be minimal.

(iv) *Effects on persons with a disability*

In general, the workfare programs discussed earlier will exempt persons with physical or mental disabilities on the assumption that such persons cannot be "expected" to work. They are thus more "deserving" of welfare payments and do not have to fulfil a reciprocal obligation in order to benefit from society's charitable spirit. Such blanket exemptions of disabled persons from all training or work schemes touch on s.15 in two regards.

Firstly, assuming *arguendo* that the training opportunities genuinely facilitate integration into the labour market, then an inability to participate in such activities can exacerbate the pre-existing disadvantage faced by recipients with disabilities. To this end, constitutionally permissible workfare programs would reasonably accommodate persons with disabilities, regardless of whether participation in such programs is voluntary or not.

In Ontario the Vocational Rehabilitation Services program¹⁵¹ (VRS) is geared to the provision of "opportunity planning" to persons with disabilities. In order to participate in this program, individuals must be deemed to be "vocationally handicapped" as well as display "an apparent potential" for employment.

149. Rochman, *supra*, note 3 at 219 found that the majority of women in provincial apprenticeship programs sponsored under workfare schemes attended hairdressing or cooking classes.

150. Weinberg, *supra*, note 5 at 440.

151. *Vocational Rehabilitation Services Act*, R.S.O. 1990, c. V-5.

Although the existence of a VRS program could help a workfare scheme survive a s.15 challenge based on discrimination regarding a physical or mental disability, the fact that persons with disabilities are placed in a separate stream and not with the bulk of recipients might still constitute a deprivation of the claimant's right to equal benefit of the law. In order to curb this possibility, these programs must offer similar levels of compensation and opportunities to disabled participants than those offered to their able-bodied peers.

Secondly, assuming the workfare programs were unhelpful, society could still perceive the participants as having discharged their "reciprocal obligation" to society and hence more "deserving" of the receipt of benefits or, more importantly, of legitimate employment so as to "get off" the welfare rolls. The non-participants, although spared the obligation to work for welfare, are still disadvantaged due to society's impression that they are undeserving for want of participation. Workfare, by treating individual welfare recipients unequally due to personal characteristics, can open the door to a violation of the equality guarantee contained in the Charter.

D. JUSTIFYING "WORKING" AND "LEARNING" FOR WELFARE UNDER SECTION 1

Section 1 allows *Charter* violations to be upheld if these violations are reasonably justifiable in a free and democratic society. Any discussion as to whether a workfare scheme amounts to a reasonable limit shall largely depend on the details of that particular scheme. The determination of whether a rights infringement amounts to a reasonable limit is a highly contextual process.¹⁵² To this end, given the fact that this article only discusses workfare schemes in the abstract, the most that it can contribute to the s.1 analysis is a broad survey of the extent to which workfare programs might be able to attain their policy goals. In this regard, attention shall be directed to how workfare programs could be structured so as to minimally impair whatever *Charter* rights they may violate.

The test to establish whether a statutory provision constitutes a "reasonable limit" was first promulgated by former Chief Justice Dickson in *The Queen v. Oakes*.¹⁵³ A limitation to a constitutional guarantee will be sustained once two conditions are met. Firstly, the objective of the legislation must be pressing and substantial. Secondly, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In

152. *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326, *per* Wilson J.

153. *Supra*, note 80.

order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right.

(1) *Workfare*

Michael Wiseman suggests several policy goals common to workfare programs.¹⁵⁴ These include: (1) workfare makes the allocation of welfare more equitable; (2) work requirements reduce the cost of welfare; (3) workfare enhances skills, contributes to employability and facilitates the integration of persons into the working world. In order to deal with the more interesting policy issues that emerge from the second tier of the Oakes test, this article shall make the assumption that the goals of workfare are pressing and substantial.

(a) **Rational Connection**

(i) *Enhancing Skills and Increasing Employability*

Perhaps the principle goal of workfare is the integration of persons on social assistance into the labour market. There is a belief that workfare may be especially effective in providing job experience to those with no work history or who have been out of the workforce for long periods of time.¹⁵⁵ Nevertheless, upon closer scrutiny, workfare does not appear to satisfy the second branch of the *Oakes* test since it is not rationally connected to the attainment of this goal.

Empirical research indicates that the work performed in the workfare programs is only tenuously linked to what is available in the employment market.¹⁵⁶

In this sense, the work experience garnered through participation in workfare has little inherent market value. Unless the training and apprenticeship experience that is offered directly prepares people for suitable jobs available in the labour market, it will be difficult to demonstrate that obliging welfare recipients to participate is rationally connected to a policy goal of integrating them into the working world.

154. M. Wiseman, "Workfare and Welfare Reform", in H. Rodgers, Jr., ed., *Beyond Welfare* (New York: M.E. Sharpe Inc., 1988).

155. It is unclear whether this policy objective could be conceived of as a pressing and substantial goal. Weinberg, *supra*, note 5 at 429, found that half of all AFDC recipients move off the rolls, usually to a job, within two years regardless of participation in any program.

156. *Ibid.* at 438.

There is widespread consensus on the point that the most important factor in re-immersing persons into the workforce is nothing less than the creation of legitimate employment opportunities. By focusing only on the labour side of the job market, workfare shall, at most, merely increase the skills level of the unemployed, not provide them with employment. A more effective expenditure of resources that would be less violative of *Charter* rights would involve incentives given to private employers so as to stimulate the creation of suitable future-oriented employment.

Given the fact that there must be personal motivation in order to be competitive in the job market (and given that this cannot be artificially created through coerced workfare participation), it is unclear how workfare can attain its long-term policy goals of reducing dependence on social assistance. At most, it will privatize and hide some of this poverty, with any resultant reduction of the burden on the taxpayer being but illusory.

Prior American as well as Canadian experiences also reveals that workfare schemes perpetuate gender inequality in the workplace. If an avowed goal of many of these schemes is to lift single mothers out of poverty, it is unclear how these programs can attain this result since they generally fail to address the needs of single mothers—the section 15 violation is thus left unanswered.

(ii) *Reducing Costs*

Workfare proponents argue that workfare will reduce costs to the social assistance system in two ways: (1) by offsetting the cost of making payments with the completion of compulsory work; and (2) by reducing the number of persons on the welfare rolls. At the outset, it should be noted that, the economic value of the work completed by workfare recipients is low since, due to the meagre salaries, the participants have little consumption power. Moreover, the New York experience discussed in section B(2)(a) of this article indicates that making jobs available for workfare recipients often means taking away jobs from already employed persons who, due to their higher salaries, prompt more investment in local economies.

Secondly, experience reveals that, although workfare may get some people off welfare, it is ineffective in combatting poverty. The recipient whose benefits are terminated is no longer technically registered on the rolls, yet remains equally in need. Little is gained by cutting someone off welfare because she failed to comply with the workfare scheme, even if this non-compliance is deliberate. The small amount of money saved by cutting off recalcitrant recipients must be weighed against the costs to society in terms of the delinquency and dislocation that arguably stem from increased poverty.

On a final note, it must be noted that workfare programs are often expensive to administer and mandate extensive surveillance activities on the part of the state. For this reason, the number of places allotted to workfare programs is often limited. Thus, despite their high cost, workfare programs can, at most, only help a small fraction of welfare recipients prepare for the labour market. Programs could become oversubscribed because welfare recipients will feel they have to join in order to avoid having their benefits reduced. In the absence of any clear guidelines, acceptance into the program shall become discretionary and result in the internal stratification of the class of persons receiving social assistance.

(iii) *Making the Provision of Welfare More Equitable*

Wiseman notes that one cardinal principle of workfare proposals is that persons who work should be better off than those who are on welfare. Nevertheless, given the fact that many workfare programs do not factor in the extra costs of "going to work" (nor the loss of medical benefits and subsidized housing that may come with employment), these programs may create a situation in which persons in workfare may be worse off than they would be on welfare. To this end, programs such as N.B. Works that address these considerations might have a greater chance of being upheld under s.1.

The failure of a comprehensive response such as GAIN indicates the extent to which workfare must lead to jobs that pay decent wages in order for the recipient to move off the welfare rolls. The "decency" of a wage must be evaluated in terms of its ability to allow the claimant to pay child-care and other work related expenses and still take home at least what would have been received from welfare.¹⁵⁷ If this is not the case, persons will be worse off after completing the program; they will then rationally quit work and drift back on welfare, and participation in the program will not have yielded any practical advantages.

(b) Minimal Impairment

Even if workfare were rationally connected to its policy goals, it seems likely to fail the "minimal impairment" branch of the *Oakes* test principally due to the fact that participation is mandatory, with (from a welfare recipient's point of view) severe punitive sanctions in the event of non-compliance. Given this observation, an incentive-based bonus system might better help welfare recipients integrate themselves into the labour market while minimally impairing their *Charter* rights.¹⁵⁸ This system could simply compensate recipients for their

157. Smart, *supra*, note 10; M. Philp, "Welfare System Shatters Dreams of a Better Life", *Globe and Mail* (21 January 1994) A1.

158. York, *supra*, note 1 at A1. An incentive-based "bonus" system is also encouraged by Rochman, *supra*, note 3 at 226. The Advisory Group on New Social Assistance Legis-

participation in certain programs. The compensation would amount to an increase in the benefits received under social assistance legislation above the adequate provision for basic needs.¹⁵⁹

It is interesting to note that "bonus-style" voluntary programs adopted by some American states experienced higher success rates and lower costs than programs such as WIN and GAIN that contain mandatory participation requirements. For example, a Massachusetts program¹⁶⁰ featuring job training, education, placement in wage employment, daycare¹⁶¹ and transitional medical services helped 86% of the voluntary participants placed into jobs to remain employed in the same job one year after leaving the program.¹⁶²

It is important that the training programs emphasize the teaching of practical knowledge¹⁶³ matched to jobs that are not only available, but that offer a decent wage and the potential for permanent employment. Without preparing persons for jobs that are actually in demand, training programs will just perpetuate the number of welfare recipients and workfare participants. Moreover, workplace centered literacy must be stressed for those recipients most in need of extensive

lation, cited in Mosher, *supra*, note 6 at 479, disapproves of the use of coercive measures as part of opportunity planning. The Group concludes at 491 that: "People who are receiving social assistance have already been sanctioned by society. Society has consigned many of these people to life on the margins of the community, in poor housing in poor districts. The educational system has failed many of them; the percentage of recipients who have not completed high school is much higher than the general population. Further sanctions are not appropriate."

159. This position is adumbrated by Parkdale Community Legal Services, *Submission to the Social Assistance Review Committee* (1986) [unpublished].

160. Called the Education and Training Program (ET).

161. For a discussion of the extent to which the cost of daycare reduces the amount of earnings from state-sponsored employment in Ontario, consult Smart, *supra*, note 10 at 234 and 241. In 1990, Smart estimated that the monthly cost of full-time care for one infant or pre-school child was likely to range from \$400.00 to \$700.00 per month; for two such children, costs would range from \$600.00 to \$1400.00 per month. These expenses must be contrasted with the actual size of welfare payments in Ontario: \$650.00 monthly for a single employable adult; \$1355.00 for a single parent with two children under 12.

162. Rochman, *supra*, note 3 at 209. The average starting salary of these jobs was \$12,000, notably better than the \$8,000 ceiling on AFDC payments. 82% of the persons placed in jobs were women.

163. There is debate related to the issue of whether education is necessarily the best link to work. Many recipients feel uncomfortable in a class-room environment in which they may have faced difficulty in the past. It is especially problematic to tie continued receipt of benefits to attendance in educational programs that are only slightly geared to the communication of concrete skills applicable in the existing labour market.

training.¹⁶⁴ In the 1990's, the few new jobs that are being created are predominantly found in the service and information-based sectors.¹⁶⁵ These often necessitate a higher degree of literacy than work in other employment sectors.¹⁶⁶

Without allowing participants to voluntarily choose from a broad range of options, workfare programs become punitive in nature. It is clearly counterproductive to threaten recipients with reduction or loss of benefits should they fail to participate in a program that does not lead to a useful end.¹⁶⁷ These considerations are especially relevant in the present economic context, where there is a lack of jobs in many areas in which traditional schemes have focused their interest (routinized or manual labour). Given the fact that the forces of a below full employment economy inevitably result in many persons being without work, obliging all recipients to "earn" their benefits through work and training appears to be misguided. A voluntary approach, on the other hand, tends to be more equitable, effective, and respectful of the participants' *Charter* rights. The emphasis on voluntary participation redefines the goal of workfare: instead of satisfying a reciprocal obligation, such programs can help recipients help themselves while preserving their autonomy.

(2) Learnfare

In general the policy goals of learnfare schemes are to prevent teenagers from dropping out of school and encourage them to pursue their studies with diligence.¹⁶⁸ Research reveals that, in the U.S., children of AFDC dependent families only miss on average 3 more days of school per year than children of non-AFDC families.¹⁶⁹ It thus seems that learnfare is based on an inaccurate

164. Over 50% of social assistance recipients in Ontario are functionally illiterate: C. Swan, "Why Millions of Canadians Can't Read This Article" (1990), 14:3 *Perception* 8 at 9.

165. Economic Council of Canada, *Good Jobs, Bad Jobs* (Ottawa: Ministry of Supply and Services, 1990).

166. "The introduction of new technologies in the workplace can render an individual 'illiterate' overnight. In effect, the level of proficiency needed to be 'literate' in the 1990's is higher than that required in the 1940's. The fact that society has raised its requirements for literacy means that many young people today, although *more* literate than their parents and grandparents, are *less* able to shoulder the heightened demands placed on them": M.A. Drumbl, "Illiteracy, Disempowerment and Injustice: How the *Ontario Human Rights Code* Can Protect Persons With Low Literacy Skills" (1993), 4 *Windsor Review of Legal and Social Issues* 107 at 111.

167. As noted by Rochman, *supra*, note 3 at 226: "If training programs are effective and perceived as effective in helping persons move into the workforce, there is every indication that people will volunteer to enter them."

168. Gerber, *supra*, note 134 at 2143.

169. Williams, *supra*, note 113 at 733, citing *Wisconsin Learnfare Program: Hearing Before*

assumption of the patterns of school attendance of children whose parent(s) are dependent on social assistance. Thus, it does not appear to be a policy goal of pressing and substantial importance to oblige these children to be monitored by workfare in order to secure their attendance in school.¹⁷⁰

Even if this amounts to a pressing and substantial goal, it is unclear whether learnfare shall attain this goal in any manner, let alone if it is rationally connected thereto. Lucy Williams, notes that "...learnfare makes a series of remarkable assumptions about the maturity and sophistication of teenagers, especially given behaviour problems already evident through truancy."¹⁷¹ Teenagers unwilling to attend school for reasons involving violence in school, drug abuse, or the need to babysit will be unlikely to change their behaviour merely to spare the family a portion of their monthly welfare cheque. It is also clear that parents exert little control over the lives of their teenage children and will thus be unable to coerce them to mechanically attend school on a regular basis. Even if a mother can ensure that a teen gets to school, there is no way for her to ensure that he stays there all day. Yet it shall be the parent who is punished. On a final note, learnfare also assumes that teens will not be tempted to use their ability to trigger a sanction as a means to threaten and control their parent(s).¹⁷² Lucy Williams points out that:

Learnfare [in fact] may lead to increased family stress and create a parental incentive to kick a child out of the home if she or he fails to attend school, thus subverting the program's stated goal of furthering education for poor teens.¹⁷³

E. IMPLICATIONS FOR LESS COERCIVE FORMS OF "WORKFARE" AND "LEARNFARE"

An argument can be made that obliging a person to engage in a mandatory job search activity under threat of the curtailment of welfare benefits could conceivably infringe that person's s.7 right to liberty and security of the person.¹⁷⁴ If

the Subcommittee on Social Security and Family Policy of the Senate Committee on Finance, 101st Congr., 2d Sess. 50 (1990).

170. *Ibid.*

171. *Ibid.* at 731.

172. *Ibid.*

173. *Ibid.*

174. It is important to look at the effects of legislation when assessing its constitutionality. From such an optic, is there not but a slim difference between coerced work and having to search and accept a labour market job of any kind in order to maintain one's interim eligibility for welfare benefits?

these job search requirements are to take place in an economic conjecture in which there are simply no jobs or oblige the recipient to look for and accept work in totally unrelated fields in which he is simply "physically capable" of working, an argument can be made that the substantive element of fundamental justice would remain unsatisfied or s.2(d) violated.

A 1991 report by the Advisory Group on New Social Assistance Legislation discusses the extent to which job search requirements not only infringe certain principles key to the tenets of the Canadian legal system, but are also so unconnected to their policy goals that it would be problematic to uphold such requirements under the *Oakes* test. Job search requirements will not alleviate long-term unemployment. They merely creates pools of underemployed persons, surely not in line with the policy goals of social welfare legislation. The Advisory Group concludes that:

The regulation that says that a person can be required to take any job of which he or she is physically capable represents thinking of a bygone era when the bulk of the workforce was made up of unskilled labourers. What it means in today's environment is that a fully qualified tradesperson who cannot find work in his or her trade this month may be cut off assistance unless the individual agrees to take any job immediately.¹⁷⁵

The earlier discussion demonstrated that learnfare schemes which reduce or eliminate a recipient's grant should her children neither attend nor make satisfactory progress in school are constitutionally suspect, especially regarding s.15. Yet what about the second variant of learnfare—where the recipient is obliged to attend training sessions as a condition of continued eligibility? There are similar infringements of the s. 7 "liberty" interest as those occasioned by workfare. Moreover, since mandatory training often takes place in the workplace (perhaps in the form of an apprenticeship), the differences between learnfare and workfare can sometimes become illusory.¹⁷⁶ To this end, the safest way to ensure the legitimacy of such programs is to make participation voluntary, with the program logically connected to the teaching of skills demanded by the market. The programs should also be linked with student bursary/loan plans; they should also offer instruction in English as well as other languages, thereby

175. *Supra*, note 52.

176. Rochman, *supra*, note 3 at 207 concludes that "...as a practical reality, many training programs require placement in a worksite." To this end, mandatory training often cannot be disaggregated from compulsory work. Since a failure to participate in the program will result in a curtailment of benefits, the recipient is *de facto* obliged to fulfil the apprenticeship component of the job training.

increasing accessibility for recently arrived immigrants, many of whom are dependent upon social assistance.

In sum, the ability of pseudo-workfare programs to survive constitutional scrutiny shall depend on their ability to provide a constructive opportunity for self-development while minimally impairing the *Charter* rights of welfare recipients. On this latter point, issues such as the degree of choice regarding participation, the ability to freely pick a program that suits one's needs, the amount of pay, the provision of child-care, the absence of a penalty for non-compliance, as well as the procedures by which non-compliance is determined shall all impact heavily on the extent to which the program can straddle the fine-line between valid legislative initiative and unconstitutional state intrusion. It is important for "opportunity planning" to be predicated on the assumption that most recipients who are able to work *want* to work and will work in fields suitable to them, not on Lawrence Mead's belief that the poor are passive and listless, requiring the electric shock therapy of workfare in order to prod them into labour market participation.

CONCLUSION

The *Charter* requirements discussed in this essay should not be perceived as obstacles to public policy reform, but rather as guidelines that can help Canada revamp its social assistance network in as equitable and coherent a manner as possible.

Patricia Evans remarks that workfare works best as an ideology.¹⁷⁷ It ensures that, symbolically, recipients are not getting a "free ride" but must earn their benefits through demonstrations of responsible behaviour. As the political climate in Canada becomes more hostile to "welfare cheats" and "profiteers"¹⁷⁸, it is hoped that governments at the federal and provincial level will not find it politically expedient to enact workfare requirements without regard to the ability of such programs to respect the constitutional rights of the recipients as well as alleviate poverty in Canada. And the numbers of poor persons is greater than many Canadians believe. A recent UNESCO report concluded that "...there seems to have been no measurable progress [in Canada] in alleviating poverty

177. Evans, *supra*, note 41.

178. In general, these fears and concerns are not substantiated by empirical evidence, quite the contrary—only 1 to 4 percent of welfare recipients commit deliberate fraud: L. Sarick, "Cheating Less Prevalent than Gossip has it, Studies Indicate", *The Globe and Mail* (21 January 1994) A1; Philp, *supra*, note 126; I. Morrison and A. Mitchell, "It's open season on welfare", *Toronto Star* (22 March 1994) A21.

in the last decade, nor in alleviating the severity of poverty among a number of particularly vulnerable groups.”¹⁷⁹

Rights discourse can successfully operate to curb the harshness of expedient political reforms. Nevertheless, cushioning welfare recipients with constitutional protection is no long-term solution to pervasive disadvantage. To this end, this article takes issue with Charles Reich’s proclamation that:

Only by making such [welfare] benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society.¹⁸⁰

This approach can be dangerous. It can induce the belief that the war against poverty can be won in the court-room, while neglecting the systemic causes of poverty in modern society. It denies Ignatieff’s observation that the way in which the state shall allot the benefits flowing from any right to welfare impacts directly on human dignity.¹⁸¹

In conclusion, constitutional agitation can, at most, serve as a stop-gap measure designed to temporarily protect the well-being of those on social assistance. The *Charter*, no matter how purposively it is interpreted, can not significantly reduce the number of poor persons in Canada. Only substantial policy reform can attain this goal.

179. United Nations Committee on Economic, Social and Cultural Rights, consideration of the Report submitted by Canada in accordance with articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, “Concluding Observations of the Committee” (May 27, 1993).

180. “The New Property” (1964), 73 *Yale L.J.* 733 at 786.

181. *Supra*, note 107.